



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

Appeal Number: IA/24742/2014

THE IMMIGRATION ACTS

**Heard at: Columbus House,
Newport
On: 19 October 2015**

**Determination Promulgated
On: 23 October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE J F W PHILLIPS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HATICE DENIZ

(anonymity direction not made)

Respondent

Representation

For the Appellant: Mr N Diwnych, Home Office Presenting Officer

For the Respondent: Mr N Gobir, Counsel instructed by Stuart Karatas Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the determination of First-tier Tribunal Judge O'Rourke in which he allowed the appeal of Mrs Deniz, a citizen of Turkey, against the Secretary of State's decision to refuse to vary leave to remain. I shall refer to Mrs Deniz as the Applicant, although she was the Appellant in the proceedings below.

2. The application under appeal was made on 1 April 2014 and was refused by reference to paragraph 284 of the Immigration Rules (HC395) on 20 May 2014. The Applicant exercised her right of appeal to the First-tier Tribunal. This is the appeal which came before Judge O'Rourke on 14 January 2015 and was allowed. The Secretary of State applied for permission to appeal to the Upper Tribunal. The application was granted by First-tier Tribunal Judge P J M Hollingworth on 27 November 2014 in the following terms:

"An arguable error of law has arisen in relation to the finding of the Judge as to the ability to delegate the running of the business as referred to at paragraph 23(ii). The Judge has referred to the position in the past and then stated that there was no guarantee that this could continue. It is arguable that inadequate reasoning has been shown. Given that the Judge has identified this factor as discrete in relation to the question of proportionality of removal doubt now arises as to the degree of weight attached in assessing the individual factors identified by the Judge. The Judge has specifically stated:

"Nor would it be reasonable to expect him to return full-time to Turkey, again because of his business and property here, combined with him having spent the last 20 years in the UK having, as he said, made his life here.""

3. At the hearing before me Mr Diwnych appeared to represent the Secretary of State and Mr Gobir represented the Applicant. No additional documents were submitted.

Background

4. The history of this appeal is detailed above. The facts, not challenged, are that the Applicant was born in Turkey on 4 March 1968. She has been in a relationship with her husband, the sponsor, for most of the last 35 years. The Applicant married the sponsor in Turkey in 1980 and they had three children together who are now adult. Their relationship broke down in 1993 and in 1995 the sponsor came to the United Kingdom and settled in this country. The couple reignited their relationship in about 2005 and in 2010 they went through a formal marriage ceremony in Turkey. Between 2005 and 2012 the Applicant regularly visited the sponsor in the UK and he also visited her in Turkey. The Applicant applied for entry clearance to enable her to join the sponsor in the United Kingdom, this was granted and she arrived in this country on 31 January 2012 and has remained here ever since. The sponsor owns a business in the United Kingdom and also owns some property. One of their adult children is a British citizen and lives nearby in the United Kingdom with the couple's two grandchildren.
5. The Applicant's initial period of leave to remain expired on 5 April 2014 and before this she made an in time application to extend that leave to remain. The application was refused and the sole reason for refusal was her failure to meet the English language requirements of the Immigration Rules. In considering her application under the exception provisions (EX1) of the Immigration Rules the Respondent considered that there were no

insurmountable obstacles to the Applicant and the sponsor continuing their family life outside the United Kingdom. The Respondent also, if briefly, considered the application outside the rules by virtue of Article 8 ECHR and noting that every state has the right to control the entry of non-nationals into its territory and that Article 8 does not give a person the automatic right to pursue family life in the UK decided that the decision was proportionate.

6. At the appeal hearing on 14 January 2015 it was accepted by both parties that the requirements of the Immigration Rules were not met. Submissions were directed solely to the issue of whether the Respondent's decision was in breach of Article 8 ECHR with the Respondent's opening submission being recorded as "Article 8 should not be relied upon where the Rules are not met". The Judge found that the decision was in accordance with the law and the Immigration Rules (paragraph 14) and went on to deal with and allow the appeal by virtue of Article 8.

Submissions

7. On behalf the Secretary of State Mr Diwnych referred to the lengthy grounds of appeal to the Upper Tribunal. He did expand upon the first ground in which it is suggested that the First-tier Judge set the standard of proof at too high a level. Mr Diwnych said that the Judge was wrong to use Article 8 as a general dispensing power and to undertake a free standing assessment. There was no finding that the Appellant's circumstances were compelling by which an examination of the Article 8 issues was justified. He confirmed that the only aspect of the Immigration Rules not met was the English language provision.
8. For the Applicant Mr Gobir said that she and the sponsor had been married for a considerable time. There is nothing wrong with the marriage and they have three children. After resuming their relationship they have been together for 10 years. The sponsor is settled in the United Kingdom and has been running his business here for 20 years and has property here. Mr Gobir said that these are compelling circumstances.
9. I gave an oral decision dismissing the appeal and reserved my written reasons.

Error of law

10. In my judgement the decision of the First-tier Tribunal does not disclose a material error of law. The facts are simple and are not disputed. The Applicant is, and at all times has been, lawfully present in the United Kingdom. She came here as a spouse to join her husband who has been settled in the United Kingdom for more than twenty years and who has a business and property interests here. Theirs is a long standing relationship of some 35 years albeit with a 10 year hiatus between 1995 and 2005. There is no doubt about the genuineness and subsistence of the marriage or of the ability of the couple to maintain themselves in the United

Kingdom. They are not a burden on the tax payer. When the Applicant made an in time application to extend the leave to remain in the United Kingdom that had been granted some three years previously to enable her to settle here with the sponsor her application failed because the English language certificate that she submitted although coming from an organisation recognised by Ofqual and the Welsh Assembly Government did not come from an organisation on the Respondent's list of approved providers. The Respondent in the refusal letter submits that this refusal and the consequent requirement for the Applicant to leave the UK is proportionate to the legitimate aim of immigration control.

11. The First-tier Tribunal allowed the Appellant's appeal finding after a detailed consideration of the issues involved that the decision was not proportionate. The Respondent appeals this decision on two grounds firstly that the wrong standard of proof was applied and secondly that Article 8 was used as a general dispensing power there being no compelling circumstances to justify its application.
12. The first of these grounds has no merit and the grant of permission to appeal is not helpful in this regard. In the grounds of appeal the Respondent suggests that paragraph 23(ii) of the decision in which the Judge postulates that there is no guarantee that the Appellant's son would be able to look after his fathers business in the future as he has in the past has set too high a standard of proof. It is a misconceived argument. The Judge is quite clearly considering the possibilities of what may happen if the Applicant and the sponsor were to leave the United Kingdom and live in Turkey, he is not requiring proof to a particular standard of a future event. How could he? It is a novel argument for the Respondent to suggest the standard of proof is set too high when the burden of proof is on the Appellant.
13. So far as the second ground is concerned this is now one of the standard grounds where an appeal has been allowed under Article 8. The jurisprudence in this regard has developed and is probably best summarised SS (Congo) and Others [2015] EWCA Civ 387 and Sunassee [2015] EWHC 1604. If the requirements of the rules cannot be met, and a judge finds that an Article 8 assessment outside them is required there needs to be compelling circumstances although it will usually be necessary to go through the Article 8 assessment to identify whether compelling circumstances exist. Paragraph 33 of the judgment in **SS (Congo)** provides guidance.

"In our judgment, even though a test of exceptionality does not apply in every case falling within the scope of Appendix FM, it is accurate to say that the general position outside the sorts of special contexts referred to above is that compelling circumstances would need to be identified to support a claim for grant of LTR outside the new Rules in Appendix FM. In our view, that is a formulation which is not as strict as a test of exceptionality or a requirement of "very compelling reasons" (as referred to in *MF (Nigeria)* in the context of the Rules applicable to foreign criminals), but which gives appropriate weight to the focused

consideration of public interest factors as finds expression in the Secretary of State's formulation of the new Rules in Appendix FM.”

14. As a result it is not sufficient to simply find that if, in a particular case, the requirements of the rules are not met, an assessment outside them will be required. Compelling reasons need to be identified taking into account the public interest although that identification may need to be undertaken by carrying out the Article 8 assessment. In this case it was common ground that the requirements of the rules were not met and whereas the Judge does not mention compelling circumstances to justify consideration outside the rules it is very clear that he considers the circumstances compelling firstly by reference to his consideration of proportionality and secondly by his conclusion. It is fallacious argument to suggest where an appeal has been properly and rationally allowed by virtue of Article 8 that the error of law was to consider Article 8 in the first place. Where there are no compelling circumstances justifying a consideration of Article 8 outside the rules it must be inconceivable that on such consideration the appeal could properly be allowed.
15. Any proportionality assessment will still need to be made “through the lens” of the new rules (see paragraphs 37 and 74 of the judgment in AO and Others [2015] EWCA Civ 250). This means that the reasons why a claimant fails to meet the requirements of the rules will usually still need to be taken into account and will form part of the assessment outside them, in order to give due weight to the public interest. In this case the First-tier Tribunal has clearly explained why the Appellant did not meet the requirements of the rules, it was not in dispute, and has properly considered proportionality through the lens of the rules. Indeed the First-tier Tribunal has addressed the public interest requirement very carefully. This is not the same as a near miss argument as suggested in the grounds of appeal to the Upper Tribunal. Put the other way around could it really be proportionate for the Secretary of State to say that it was in the public interest for family lawfully settled in this country who were not a burden on the taxpayer to be removed because the one partner had passed an English language test approved by the Welsh Assembly Government rather than one provided by an examiner on the Home Office list of providers?
16. In my judgement the First-tier Tribunal Judge erred in his failure to use the word compelling in his decision but this did not amount to an error of law let alone a material error of law because in a clearly reasoned decision the Judge explains why the Appellant's circumstances are compelling and reaches an inevitable conclusion taking into account the public interest that the Respondent's decision was disproportionate. My conclusion from all of the above is that the decision of the First-tier Tribunal contains no error of law material to the decision to allow the appeal. The appeal of the Secretary of State is therefore dismissed.

Summary

17. The decision of the First-tier Tribunal did not involve the making of a material error of law. I dismiss the Secretary of State's appeal.

Signed:

Date:

J F W Phillips
Deputy Judge of the Upper Tribunal