



The Upper Tribunal
(Immigration and Asylum Chamber)

Appeal number: IA/25049/2014

THE IMMIGRATION ACTS

Heard at Field House
On January 23, 2015

Determination Promulgated
On February 13, 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS ALEV KILINC
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr Duffy (Home Office Presenting Officer)

For the Respondent: Ms Asanovic, Counsel, instructed by Pickup Scott Solicitors

DETERMINATION AND REASONS

1. Whereas the original respondent is the appealing party, I shall, in the interests of convenience and consistency, replicate the nomenclature of the decision at first instance.
2. The appellant is a citizen of Turkey. The appellant entered the United Kingdom on June 29, 2004 on an entry clearance visa valid until December 9, 2004 with the intention of being with her partner, Yasin Kilinc. On August 25, 2005 she married her partner who is a Turkish national. She applied for limited leave to remain under the

European Community Association Agreement on December 2, 2004 but the respondent refused her application on July 9, 2007. The appellant appealed that decision on July 24, 2007 but her appeal was dismissed and appeal rights were exhausted on November 8, 2007. The appellant gave birth to two children born April 23, 2006 and October 12, 2008 and those children and her husband were granted discretionary leave to remain on November 2, 2012 under the Legacy Programme and this leave is valid until May 2, 2015.

3. On March 28, 2013 the appellant applied for leave to remain based on family life but this was refused without a right of appeal. The appellant judicially reviewed the decision to refuse the application and by consent on February 27, 2014 the respondent agreed to review it further. On June 3, 2014 the respondent refused her application under the Immigration Rules.
4. The appellant appealed under section 82(1) of the Nationality, Immigration and Asylum Act 2002 on June 12, 2014 and the matter came before Judge of the First-tier Tribunal Ghaffar (hereinafter referred to as the "FtTJ") on October 1, 2014 and in a decision promulgated on October 17, 2014 he dismissed the appeal under the Immigration Rules but allowed the appeal on article 8 ECHR grounds finding the appellant's removal would be a disproportionate interference with her family life.
5. The respondent lodged grounds of appeal on October 23, 2014. She submitted the reasons given for allowing the appeal were not exceptional and did not merit the granting of relief under article 8 ECHR because the family life could continue in Turkey. The fact the children and husband had discretionary leave until May 2015 was a factor to be taken into account but it was not determinative of their ability to return to Turkey. The appellant's husband's asylum claim had been dismissed and no weight should have been attached to this.
6. Judge of the First-tier Tribunal McDade granted permission to appeal on December 2, 2014 stating there was an arguable error in law based on the grounds.
7. On December 23, 2014 the appellant's solicitors filed a Rule 24 response in which they submitted:
 - a. The FtTJ was entitled to allow the application under article 8 ECHR as he had given reasons in paragraphs [18] and [22] of his determination why he felt it necessary to consider the appeal outside of the rules.
 - b. At paragraph [24] of his determination the FtTJ considered all factors (positive and negative) and concluded removal was disproportionate.
8. The appellant was in attendance in court and was represented as set out above.

ERROR OF LAW SUBMISSIONS

9. Mr Duffy relied on the grounds of appeal. Whilst there was no intermediary test of "exceptionality" he maintained that the FtTJ had to find something to allow the appeal under article 8 ECHR. Mr Duffy accepted the appellant and her husband had lived in the United Kingdom for many years and that the Secretary of State had been aware of both the appellant, her husband and eldest child since 2007 but she had rejected all claims by the appellant to be a dependant on her husband's claim. It was

accepted the appellant's husband had leave following his failed asylum claim as he had been granted discretionary leave based on the Legacy Programme. However, the FtTJ failed to take into account that article 8 does not give the appellant an automatic right to choose where they want to live and the FtTJ had failed to consider at all the option of a life in Turkey as a family unit bearing in mind all parties were Turkish nationals and none of them had any permanent entitlement to remain here. The FtTJ failed to apply the "reasonableness" test set out in Huang (FC) (Respondent) v. Secretary of State for the Home Department (Appellant) and Kashmiri (FC) (Appellant) v. Secretary of State for the Home Department (Respondent) (Conjoined Appeals) [2007] UKHL 11 and had regard to the fact the Immigration Rules were not met and could never be met because the appellant's husband and children only had discretionary leave.

10. Ms Asanovic submitted that the grounds of appeal did not identify an error in law because there was no requirement to show "exceptionality" before considering article 8 outside of the Rules. The FtTJ was aware the appellant had been here for ten years and her husband had been here for fourteen years. The grounds argued today were nothing more than a challenge to the FtTJ's findings. The FtTJ reminded himself of the correct law and in particular Razgar [2004] UKHL 00027, EV (Philippines) [2014] EWCA Civ 874 and section 19 of the Immigration Act 2014. There FtTJ considered the appeal outside of the Rules because the appellant could not meet the rules as her husband only had limited leave to remain. The findings made were open to the FtTJ as he discounted return to Turkey finding it would be disproportionate.
11. I reserved my decision.

ERROR OF LAW ASSESSMENT

12. The FtTJ allowed the appellant's appeal under article 8 ECHR having found at paragraph [17] of his determination that the appellant did not satisfy the Immigration Rules. At paragraph [18] he went on to find there were exceptional and compassionate circumstances to consider the matter outside of the Rules.
13. Mr Duffy accepted that there was no longer a requirement to find "exceptional circumstances" to consider a case outside of the Rules but he argued that in order to allow the appeal under article 8 the FtTJ had to demonstrate that he had carried out a balancing exercise in proportionality in determining whether there were "exceptional circumstances" requiring the grant of leave outside the Rules under Article 8.
14. Judge Grubb sitting as a High Court judge stated at paragraph [59] case of R (on the application of Halimatu SA Adiya Damilola Aliyu and Fatima Oluwakemi Aliyu) v Secretary of State for the Home Department [2014] EWHC 3919 (Admin) re-affirmed the test to be applied as:

"In my judgment, the Secretary of State (apart from 'complete code' situations) always has a discretion to grant leave outside the Rules. That discretion must be exercised on the basis of Article 8 considerations, in particular assessing all relevant factors in determining whether a decision is proportionate under Article 8.2. There is, in principle, no "threshold" criterion of "arguability". I respectfully agree with what Aikens LJ said in this regard in MM (at [128]). However that factor, taken together with other

factors such as the extent to which the Rules have taken into account an individual's circumstances relevant to Article 8, will condition the nature and extent of the consideration required as a matter of law by the Secretary of State of an individual's claim under Article 8 outside the Rules. If there is no arguable case, it will suffice for the Secretary of State simply briefly to say so giving adequate reasons for that conclusion. At the other extreme, where there are arguable good grounds that the Rules do not adequately deal with an individual's circumstances relevant in assessing Article 8, the Secretary of State must consider those circumstances and identifiably carry out the balancing exercise required by proportionality in determining whether there are "exceptional circumstances" requiring the grant of leave outside the Rules under Article 8."

15. In deciding Mr Duffy's submission I have to have regard to the FtTJ's whole determination as this identifies to me what matters the FtTJ was aware of and why he allowed the appeal.
16. The FtTJ took oral evidence from the appellant and her husband and he also had written statements of evidence. The parties' immigration history was noted in paragraphs [3], [7], [9] and [10] of his determination. The FtTJ was aware of both their nationalities and the fact the appellant's husband, in particular, had family in Turkey.
17. The FtTJ gave good reasons in paragraph [18] for considering the case outside of the Rules not least because the best interests of the children are not covered by those Rules. He was aware of the relevance of the Immigration Act 2014 and importantly he noted the family matrix in paragraph [22] where he found the appellant and her husband were in a genuine and subsisting marriage and they had two young children who were cared for primarily by the appellant. He found it would be unreasonable to expect the two children to leave the United Kingdom in light of the length of time they had been living here and had integrated themselves into UK life. These are of course factors that the Tribunal must have regard to both under Section 55 of the Borders, Citizenship and Immigration Act 2009 and Section 117B of the 2002 Act (as inserted by Section 19 of the Immigration Act 2014).
18. The FtTJ then went on to consider the children and section 55 "best interest" and reminded himself of the decision of the relevant paragraphs of EV. The Tribunal at paragraph [35] defines "best interests of the children" as having regard to:

" ... (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (c) what stage their education has reached; (d) to what extent they have become distanced from the country to which it is proposed that they return; (e) how renewable their connection with it may be; (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens."
19. He considered the appeal on the basis that at the date of hearing the appellant's husband was entitled to remain here, the ages of the children, the length of time they had lived here, the fact the youngest had never been to Turkey and the eldest had spent a short time there and the children spoke English as their main language.

20. By following the decision of EV the FtTJ had regard to the best interests of the children set against the economic well-being of the country and in particular she had regard to the fact their father was able to financially support both of them, the appellant and himself. He also took into account the fact the children and father had leave to remain albeit that was discretionary leave.
21. The FtTJ was aware of the family circumstances in Turkey and attached no weight to the appellant's husband's fear of being returned to Turkey.
22. Article 8 is a discretionary right and it is discretionary because it does mean applicants can choose where they want to live. However, in this appeal the FtTJ had regard to the evidence, immigration histories and circumstances and he concluded that it would be disproportionate to remove.
23. Whilst Mr Duffy sought to persuade me that there was an error in law I am satisfied that the decision reached was properly open to the FtTJ and I also find that there FtTJ did not err in his approach to article 8 ECHR. He properly dismissed the appeal under the Rules and took those factors along with all the other matters in allowing the appeal outside of the Rules.

Decision

24. The decision of the First-tier Tribunal did not disclose an error in law. I upheld the original decision.
25. Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) an appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. No order was made in the First-tier and I see no reason to amend that order.

Signed:

Dated: **February 13, 2015**

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT

I make no alteration to the original fee award.

Signed:

Dated: **February 13, 2015**

Deputy Upper Tribunal Judge Alis