



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/09069/2018

THE IMMIGRATION ACTS

Heard at: Manchester Civil Justice Centre  
On 1<sup>st</sup> July 2019

Decision & Reasons Promulgated  
On 11<sup>th</sup> July 2019

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

The Secretary of State for the Home Department

Appellant

And

CY

(no anonymity direction made)

Respondent

For the Appellant: Mr C. Bates, Senior Home Office Presenting Officer  
For the Respondent: Mrs Rafiq, Bellamy & Co.

DECISION AND REASONS

1. The Respondent is a national of Turkey born in 1978. On the 9<sup>th</sup> January 2019 the First-tier Tribunal (Judge Cruthers) allowed his human rights appeal against the Secretary of State's decision to deport him from the United Kingdom. Judge Woodcraft has now granted the Secretary of State permission to appeal against that decision.

## Background and Decision of the First-tier Tribunal

2. The bare facts are as follows. The Respondent married a British national in Turkey and entered this country on a valid spouse settlement visa in August 2009. That marriage, to K, still subsists and they have two British children who live in the family home in Lancashire. They are today aged 2 and 8. On the 16<sup>th</sup> December 2010 the Respondent was convicted on two counts of sexual activity with a male child under 16. These convictions resulted in him receiving a custodial sentence of 2 years on the 28<sup>th</sup> January 2011. The Respondent served one year of that sentence before being released on licence into the community. His name has been entered onto the Sex Offender Register for 10 years, and a Sexual Prevention Order was made for the same period.
3. The Secretary of State notified the Respondent of his liability to deportation on the 16<sup>th</sup> February 2011 and the Deportation Order was signed on the 21<sup>st</sup> February 2012. The Respondent's appeal against that decision was dismissed by First-tier Tribunal Judge McAll in 2012.
4. Since that time the Respondent has continued to live with his family. He and his representatives have maintained contact with the Home Office, sending further representations in April and May 2013, November 2015, March 2016 and June 2017. No action was taken to implement the 2012 Deportation Order until on the 11<sup>th</sup> July 2018 the Secretary of State refused to revoke it. This decision triggered a fresh appeal right which the Respondent exercised.
5. The grounds of appeal before Judge Cruthers were a) protection and b) human rights. In respect of (b) the Respondent feared retributive attacks in Turkey because of the nature of his offences. Whilst Judge Cruthers accepted that the Respondent may have a genuinely held subjective fear about this, the evidence fell well short of establishing an objectively well-founded risk of harm. The protection appeal was accordingly dismissed and there has been no challenge to that decision.
6. As to the human rights claim Judge Cruthers heard live evidence from the Respondent, his wife of some eight years, K, and K's father. He was provided with written evidence from a number of additional witnesses, primarily members of K's family, all of whom spoke highly of the Respondent. Particular emphasis was placed on the assertion that the Respondent is the primary carer for the couple's two children, since K works full time. She is employed by the NHS as a Critical Care Nurse and is currently undertaking a BSc degree permitting her to specialise in intensive care nursing.
7. In his deliberations Judge Cruthers directed himself to the earlier decision of Judge McAll and indicated that he intended to apply the *Devaseelan* principles. He identified the relevant test in a case such as this was whether the Respondent's removal from the United Kingdom would have "unduly harsh" consequences for the Respondent's British wife and/or children, that test being derived from s117C(5) of the Nationality, Immigration and Asylum Act 2002 (as amended), and

as it is transposed to paragraph 399 of the Immigration Rules. That paragraph required the Respondent to demonstrate that the impact on his children would be 'unduly harsh' in two respects: if they remained here without their father, and if they went with him to Turkey. The latter question had already been conceded by the Secretary of State so the only issue for Judge Cruthers to decide was whether it would be 'unduly harsh' for these children to remain here without the Respondent.

8. He found, for the following reasons, that it was:
  - i) The Respondent does not pose an ongoing and real 'danger to the community' [§51-56];
  - ii) Probation and social services have not considered it necessary to have any further involvement with the family [§79]
  - iii) It "could not be clearer" that the best interests of the children would be served by having their father remain with them [§70]
  - iv) The household is dependent upon the Respondent undertaking the majority of the childcare responsibilities [§77]
  - v) In his absence K would have to either drastically reduce her hours or give up her career altogether [§77]
  - vi) She has worked extremely hard in a challenging profession and for her to have to give that up would be unduly harsh on her [§77]
  - vii) The financial impact upon the family would be significant [§77]
  - viii) The Respondent's removal would have a "massive detrimental impact" on his wife and sons, some 9 years after the crimes were committed [§78]
  - ix) The younger child in particular would be affected, his primary attachment figure being his father [§80]
  - x) The delay is relevant inasmuch as the Respondent may have still been considered to pose a risk to children in 2012, but today, six years later with no further offending, he can demonstrate that he is not [§82]. Furthermore his wife has during that time invested in, and advanced, her professional career and the Respondent has acted as primary carer for his sons [§83].
9. Judge Cruthers added, although this was not part of his 'unduly harsh' assessment, that it would be contrary to the public interest if K were to leave her job or to significantly reduce her hours.

### **The Appeal**

10. The Secretary of State now appeals on the following grounds:
  - i) Impermissible speculation. The Tribunal found that K would have to give up work if the Respondent were to be deported. The Secretary of State contends

that this was not a finding open to the Tribunal on the evidence before it, given the indication that she already receives assistance from her own family, and the fact that other single parents manage to continue to work.

- ii) Misdirection on the public interest. The Tribunal found that it was not in the public interest that a Critical Care nurse give up employment. This was not a finding open to it because the public interest in deportation appeals is set down in statute, and is heavily weighted in favour of deportation.
  - iii) The finding that the family income would reduce is not in itself a factor capable of establishing deportation to have 'unduly harsh consequences'.
  - iv) Ditto re the finding that some of the children's activities would have to be curtailed.
  - v) The Tribunal has not made a finding to the effect that the children would not "be adequately cared for both physically and or emotionally" if their father were to be deported. For instance, no medical needs have been identified.
  - vi) The delay in taking action did not dilute the public interest in removal.
11. For the Respondent Mrs Rafique made submissions defending the decision.

### **Discussion and Findings**

12. Ground (i) is not made out. The Tribunal is required to make an assessment on the evidence that is before it, and that is what it did. It heard from K and members of K's family and it plainly had regard to the fact that the children's grandparents are involved to some extent in their care: see for instance paragraph 16. Having done so the Tribunal concluded that the likely outcome of the Respondent's deportation would be that his wife would need to either reduce her working hours, or to give up work altogether. That was a reasonable and rational conclusion for the Tribunal to reach given the evidence that she has been able to advance her a career, and work the hours that she does, because her husband has been there to care for the children. The Secretary of State characterises its conclusion as speculative but there is nothing speculative about it. That was K's credible assessment of her own position. In fact it is the Secretary of State who invites speculation, by suggesting that the wider family could be expected to restructure their lives and commitments in order to fill the gap left by the removal of a full time parent. There is no evidential foundation for the conclusion that the Secretary of State invites this Tribunal to draw from the evidence. On the contrary, the evidence suggested that in fact the wider family were also dependent upon the Respondent to assist them: see paragraph 12 of the determination referring to the evidence of K's elderly grandmother to the effect that the Respondent "keeps an eye" on her when everyone else is out at work, performing daily tasks such as cleaning, shopping, gardening and DIY in her home.

13. There is nothing to be gained from the Secretary of State pointing out that there are other single parent families in the United Kingdom. That is true, but does nothing to undermine the conclusion reached by the First-tier Tribunal that in this case it would be unduly harsh to expect their children to live without their father, who is their primary carer.
14. There is no misdirection in the Tribunal having found that it would be in the public interest to have the skills of a critical care nurse retained by the NHS. First of all I would note that this factor is expressly excluded from the 'unduly harsh' assessment so is in essence obiter. Secondly it is a sentiment that is in my view correct. In assessing proportionality Tribunals are required to conduct a global appraisal of all of the relevant circumstances. The fact that this woman is a committed public servant in a difficult, demanding and skilled role was one facet of the evidence worth remarking upon. Insofar as the grounds suggest that it should have been excluded because it does not appear in the list at Part 5 of the Nationality, Immigration and Asylum Act 2002 that is specious. Whilst parliament there intended to identify factors that reflected the public interest, it is not an exhaustive list.
15. Grounds (iii) and (iv) are, as statements of law, perfectly correct, but they are not an accurate representation of the reasoning in the determination. Judge Cruthers did not, for instance, find that the reduction in family income would *in itself* render deportation unduly harsh. He found that it was one factor to consider in the overall assessment of the best interests of these children, and ultimately in the assessment under s117C.
16. Ground (v) appears to suggest that a child would need to be unwell, or in some way face neglect, for an appellant to succeed on 'undue harshness' grounds. That is fallacious. The task for the decision maker is to conduct a rounded assessment of whether that child in the particular circumstances of the case would face unduly harsh consequences should the parent be removed. That is what Judge Cruthers has done. Insofar as Mr Bates submitted that there was nothing that elevated this case above the 'commonplace' that is simply incorrect. This is a family where the prospective deportee undertakes all of the primary childcare responsibilities and where the children were found to face a "massive detrimental impact" if their father – the primary attachment figure – were to be removed. These were moreover relationships that had been strengthened and cemented during six years of Home Office inaction, that being the relevance of the delay.
17. I find no error of law in the determination of the First-tier Tribunal.

### **Anonymity**

18. The Appellant is a criminal and his identity would not therefore ordinarily attract protection. His case involves however the presence in the United Kingdom of his two British children.

19. I am concerned that identification of the Appellant could lead to identification of those children.
20. As such I am satisfied, having had regard to the guidance in the *Presidential Guidance Note No 1 of 2013: Anonymity Orders*, that it would be appropriate to make an order in accordance with Rule 14 of the *Tribunal Procedure (Upper Tribunal) Rules 2008* in the following terms:

“Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings”

### **Decisions**

21. The determination of the First-tier Tribunal contains no error of law and it is upheld.
22. There is an order for anonymity.

Upper Tribunal Judge Bruce  
5th July 2019