Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00095/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 3 January 2014	**On 30 January 2014**
Prepared 6 January 2014	

Before

UPPER TRIBUNAL JUDGE MCGEACHY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BURAK SAGMAN

Respondent

Representation:

For the Appellant: Mr P Nath, Senior Home Office Presenting Officer
For the Respondent: Mr A Miah, of Counsel, of Temple Court Chamber

DETERMINATION AND REASONS

1. The Secretary of State appeals, with permission, against a decision of the First-tier Tribunal (First-tier Tribunal Judge Beach and Dr P L Ravenscroft (non-legal member)) who, in a determination promulgated on 30 September 2013, allowed the

appeal of Burak Sagman against a decision of the Secretary of State made on 18 December 2012 to deport the appellant.

2. Although the Secretary of State is the appellant in the appeal before me, I will for ease of reference refer to her as the respondent as she was the respondent before the First-tier Tribunal. Similarly, I will refer to Burak Sagman as the appellant, as he was the appellant in the First-tier Tribunal.

3. The appellant entered Britain in November 1988 and, having married a British national on 26 August 1989, was granted indefinite leave to remain in October 1990. His marriage has now ended.

4. In 1989 the appellant was convicted in Turkey, in his absence, for the offence of organised export smuggling and sentenced, in absentia, to nine years, three months' imprisonment. 2 other offences remain outstanding. . In 1994 he was arrested in Belgium and the Turkish authorities sought his extradition. That application was refused by the Court of Appeal in Brussels on 19 January 1995. The appellant, on release from custody in Belgium, returned to Britain.

5. Extradition proceedings were started in Britain but in June 2001 these were dismissed in the High Court after a hearing before Rose LJ and Silber J.

6. On 17 March 2004, the appellant was convicted for conspiracy to supply a Class A drug and possession to supply Class A drugs and sentenced to seven years' imprisonment. In 2006 he was served with notice of liability to deportation and a further notice of intention to deport in June 2007. The appellant appealed against that decision. The decision was subsequently withdrawn by the respondent on 20 August 2007 after the appellant had been placed in immigration detention. On 23 November 2009 he was served with a notice of liability to deportation and a further questionnaire to which the appellant responded by return. Another questionnaire was served on him in March 2011, to which the appellant again responded promptly. In December 2012 a decision to deport the appellant was made.

7. At the hearing of the appeal before the First-tier Tribunal, the appellant gave evidence referring to a business which he had set up in Britain and to various certificates which indicated that he had been free of alcohol and drugs for nine years and ten months.

8. He said that he had absconded from bail in Turkey in 1987 and travelled to Greece before coming to Britain. There had been eleven cases in Turkey against him – five for which he had been sentenced to nine years and two months and another six cases where he had been fined. He claimed that although he had been out of Turkey for 25 years, two cases had been kept alive.

9. The appellant confirmed that he did not know the whereabouts of his wife and they had no children. He claimed that the two companies which he had started had a

turnover of nearly £600,000. He said that if he were returned to Turkey, he would be imprisoned.

10. The appellant referred to voluntary work he had undertaken here, and claimed that his company's VAT and tax payments were up-to-date.

11. The Tribunal heard evidence from the wife of the appellant's business partner and also from a Mr John Mealyer of RAPT (Rehabilitation for Addicted Prisoners Trust). Mr Mealyer gave evidence that the appellant had followed the RAPT drugs programme completely and that he worked voluntarily with Narcotics Anonymous where he was a practising member and had a role in the service structure.

12. Having heard submissions from both representatives, the Tribunal set out their findings and conclusions in paragraphs 40 onwards of their determination.

13. Having quoted from paragraph 398 of the Rules, the Tribunal stated in paragraph 42:-

> "42. Paragraphs 399 and 399A do not apply to the Appellant because he does not fall within Paragraph 398(b) or (c). It will therefore be only in exceptional circumstances that the public interest in deporting the Appellant will be outweighed by other factors."

14. They then quoted from the determination in **MF (Article 8 – new rules) Nigeria [2012] 00393 (IAC)** setting out the head note in full before detailing the head notes in the cases of **Izuazu (Article 8 – new rules) [2013] UKUT 00045** and **Ogundimo (Article 8 – new rules) [2013] UKUT 00060**. They also quoted from the judgment in **Nagre** and the judgment in **SS (Nigeria) [2013] EWCA Civ 550**. They referred to paragraphs 45 of that judgment which states:-

> "45. The second characteristic is that there is no rule requiring an exceptional case under Article 8 to be demonstrated. Here there is a risk that the absence of such a rule may appear to suggest that there is a single standard for breach of Article 8 which, once met, will carry the claim whatever the context. But that cannot be what is meant. The public interest in favour of removal or deportation may be stronger or weaker; and accordingly it will take more, or less, to mount an Article 8 claim that will prevail against it…
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> 46. Thus while the authorities demonstrate that there is no rule of exceptionality; they also clearly show that the more pressing the public interest in removal or deportation, the stronger must be the claim under Article 8 if it is to prevail…"

15. The Tribunal then went on to note the appellant's conviction to supply heroin, a Class A drug and the sentence passed on the appellant of seven years' imprisonment. They noted that he had also been sentenced to two years' imprisonment to run concurrently for possession of a Class A drug.

16. They quoted from the sentencing remarks in which the judge had stated:-

> "The Court will give you the fullest credit for pleading guilty and accepting you had got yourself involved in what can only be described as serious crime and criminals. You clearly were an important cog in this conspiracy from all the evidence I heard in the case and trial, which of course, involved the distribution of Class A drugs on a large scale; and you were caught red-handed in possession of heroin valued at £675,000. You also clearly, I accept, were somebody who was an addict, and I accept that you were being paid in drugs as well as receiving some financial benefit. This was a sophisticated conspiracy as the Crown has reminded me in its opening this morning and you played a full part in it; and a substantial term of imprisonment must follow…"

17. Having concluded that the appellant took responsibility for this offence and that he had said that it had been committed at least partly because of his own drug addiction, the Tribunal referred to "very positive reports" from the prison about the appellant's behaviour and his release in June 2007.

18. In paragraphs 51 onwards, they referred to the appellant's probation report, emphasised the seriousness of the appellant's offence, and set out the various factors which they considered should be taken into account when assessing the proportionality of removal. They wrote in paragraph 51 onwards :-

> "51. The Probation report regarding the Appellant's potential release from prison on licence stated:
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> > '*The seconded Probation Officer's report contains a detailed list of [the Appellant's] completed drug rehabilitative work. It is also noted that he has completed the RAPT programme and his efforts are supported by twice weekly voluntary drug tests, none of which have proved positive for drugs. In January 2007, he was made senior peer supporter. In this role he is entrusted to different areas of the prison to give support and to encourage others engaging on the RAPT drug programme. Mr Sagman regularly attends NA and Alcoholics Anonymous. Mr Sagman is the Secretary of NA group meetings for the remand wing of the prison… He has no adjudications and he has held Enhanced status since January 2007…*'
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> 52. The report further states:
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> > '*Mr Sagman appeared to be sincere when he spoke of the change in his attitude regarding the offences. He described how in his previous lifestyle he cared little for the illegality of his offending behaviour and he held no regard for the victims of drug related crime… Mr Sagman's claim that he has been drug free for three years and that he wants to remain so is well supported by his conduct and progress through his sentence…*'
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> 53. The report also states:
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> > '*I do not doubt his motivation to continue with drug rehabilitation work through the voluntary organisations of NA and AA…*'
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> 54. The Parole Board report, dated 20th March 2007, states:

> '*Mr Sagman is described as a model prisoner; he has not accrued any adjudications or positive drug tests; he has enhanced status and he has used his time constructively by obtaining employment and improving his educational skills… To his credit he has further made a determined effort to address his areas of risk and has in particular completed the Ley Prison Programme and Rapt with favourable reports… Both probation report writers support his early release and both assess his risk of re-offending and of harm as low.*'

55. There are positive reports regarding the Appellant's time in prison and we note that a particular role was created for him in prison because of his exceptional work and rapport with other prisoners suffering from addiction problems. These factors all show that the Appellant is considered by the prison authorities to be a prisoner who can be trusted. It also suggests that the Appellant has used his time in prison constructively.

56. The Appellant does not have any family in the UK although he has formed some close friendships. He is technically still married to a British national but does not currently know here whereabouts. We have therefore given no consideration to this relationship in our assessment of the Appellant's circumstances. We do note, however, that the Appellant has always been lawfully in the UK, initially with leave to enter as a student then with leave to remain on the basis of his marriage and then with indefinite leave to remain. He has also been in the UK for over 25 years (albeit that 3 of those years have been spent in prison).

57. The Appellant has also formed two businesses in the UK. We were provided with the cash flow record of one of these businesses but there was very little other evidence before us with regard to this business, for example, accounts or payroll information showing the number of employees or bank statements showing income from the business. This is of some concern as it makes it harder for us to assess the extent of the business in an objective manner. Moreover, there was no suggestion that the business could not be run by the Appellant's business partner if the Appellant were not in the UK or that this would lead to redundancies amongst staff. The business is a web-based business which on the Appellant's evidence has customers across Europe. There was no evidence before us to suggest that there was any reason why the Appellant could not continue to be involved with the business if he were based in Turkey.

58. The Appellant has continued his involvement with Narcotics Anonymous since his release from prison. This involvement is at a higher level than simply attending Narcotics Anonymous meetings and the Appellant is specifically involved in the structure of Narcotics Anonymous. We find that the Appellant has made a considerable commitment to Narcotics Anonymous and to helping others who also suffer from addictions and that he intends to continue this role in the future.

59. The Appellant was convicted of a serious offence and there is a strong argument that the public interest would be served if the Appellant were deported to Turkey as a result of the seriousness of the offence and as a deterrent to others. However, balanced against this are the factors outlined above as well as the fact that there was a delay in making a decision regarding the Appellant's deportation. The initial decision was withdrawn in 2007 but the Respondent did

not make a new decision until December 2012. This delay of 5 years inevitably weakens the Respondent's argument that it is the public interest to deport the Appellant given that the Appellant has been out of prison during this time and living in the community. We note too that the Appellant is assessed as being at low risk of re-offending. There is no suggestion that the Appellant has re-offended since his release from prison.

60. The Appellant has raised a further issue before us which is that he states that he is at risk of a prison sentence in Turkey following an unfair trial in his absence. There have previously been extradition proceedings in respect of the Appellant where the High Court found that the extradition proceedings were unjust and oppressive. The Appellant was not therefore extradited.

61. The issue has been raised again because the Respondent states that as a result of the statute of limitations, the Appellant will not be expected to serve his sentence because he has been outside Turkey for 27 years. The Appellant states that his brother in Turkey has made enquiries and that he has been told that two sentences remain outstanding; one in relation to a confiscation fine and one in relation to a sentence of imprisonment. The Appellant has provided documents in relation to this. There was no direct challenge to the authenticity of those documents by the Respondent. The documents state that there is an arrest warrant outstanding with regard to the Appellant although somewhat confusingly it refers to laws which have been abolished. The document makes reference to the Appellant being wanted for questioning rather than being wanted to serve his period of imprisonment.

62. The COI response to a question posed by the Respondent regarding the statute of limitations states:

> '*The COI service was unable to find sources to indicate whether the individual, if already having been tried and sentenced, could be made to service this sentence on return, in spite of any statute of limitations. Today's Zaman reported on 18 March 2012 that:*
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> > *"Turkey made amendments to the Turkish Penal Code (TCK) in 2005, which extended the statute of limitations in criminal cases; however, jurists believe that the country can further extend or totally remove the statute of limitations in certain criminal cases to make sure that justice is fully served… The statute requires that cases be concluded within seven and a half years of the date of the incident. According to a new regulation regarding the statute of limitations that went into force in 2005, cases involving fatal accidents must be concluded within 15 years… The Council of Europe document entitled 'Turkey – national procedures for extradition', undated…stated: 'In Turkish Criminal Code different statutes of limitation periods are prescribed regarding criminal proceedings and penalties…'"'*

63. The Appellant provided an opinion from a Turkish lawyer with regard to the offences and sentences. This opinion states:

> '*The Turkish Court does not have the power to stop a case because of the lapse of time and its effect on the suspect's ability to defend itself… The State Security Courts are still existing and functioning.*'

64. The opinion further states:

> '*There is both time barring for trial and time barring for penalty in the Turkish Penal Code… If Burak Sagman is tried according to article 27 of Law no 1918, the foreseen punishment would be either 10-15 years of imprisonment with hard labour…or 8 to 10 years of imprisonment with hard labour… According to article 103 of the Turkish Penal Code, the beginning of time barring is the date of last act committed by the suspect in order to complete the criminal offence… If I take 31.05.1986 as the date of the last action time barring would start on 31.05.2001. After this date no more action can be taken against Burak Sagman for this particular offence and the legal case is cancelled…*'

65. The opinion also states:

> '*…I believe that Burak Sagman, after so much time, will not be able to defend himself well enough in those trials that could result with very heavy prison sentences. Burak Sagman has lost all his contacts. He will not be able to find the necessary information and documents, to find witnesses and thus to organise his defence. His situation will be even more difficult because he will be arrested if he is sent back to Turkey. It is not possible that the trial will be "fair" from the point of view of the defence…*'

66. The information before us is very unclear with regard to whether the Appellant's sentences are still outstanding. There is documentary evidence before us of a Turkish arrest warrant which strongly suggests that the Appellant is still of interest to the authorities. There has been discussion of the Appellant's sentences now being time barred but the evidence before us with regard to this is again equivocal. The COI response suggests that the Turkish authorities can, in effect, extend the time and it is also unclear whether the statute of limitations also applies to sentences which have already been made or simply to trials for offences being time barred. We find on the basis of the evidence before us that we cannot confidently state that the Appellant will not be made to serve his sentences simply as a result of the statute of limitations. We also note the High Court's judgment that stated that extradition would be unjust and oppressive because of the forum of the trial. In light of this and in light of the relevant case law as set out above we find that there is a real risk of a breach of Article 6 and 8 if the Appellant were returned to Turkey. We further find, having assessed all the evidence, that it would not be proportionate to deport the Appellant from the UK for the reasons given above."

19. In paragraph 61 the Tribunal they stated that the appellant "has shown that there are exceptional circumstances under the Rules". They therefore stated that they allowed the appeal under the Immigration Rules and on human rights grounds.

20. The Secretary of State submitted lengthy grounds of appeal stating firstly that there was a failure to give reasons or adequate reasons for findings on material matters as

the Tribunal had failed to identify the circumstances which made the appellant's case so exceptional that it would fall within the exceptions outweighing the public interest. It was submitted that the term "exceptional" meant circumstances which although the requirement of the Rules had not been met a refusal would result in an unjustifiably harsh outcome. It was claimed that there was no "quite exceptionally compelling feature" and it was argued that the Tribunal had failed to resolve the conflicting evidence regarding the appellant's risk of a further trial or imprisonment if deported to Turkey.

21. It was claimed the Tribunal had failed to give consideration to the severity of the appellant's offences and that they were wrong to take into account the delay in reaching a conclusion in the appellant's case. It was claimed they had not considered properly the public interest in removal and further had erred in considering a two stage test in the Article 8 assessment.

22. The grounds referred to the judgment of the Court of Appeal in **MF (Nigeria)**.

23. The application was considered in the First-tier by Designated First-tier Tribunal Judge McCarthy and refused . He stated that the Court of Appeal:

> "…has confirmed that the SSHD's meaning of 'exceptional' as used in Immigration Rules is not as set out by the author of the grounds who refers to the proportionality assessment."

He found that the Tribunal had been entitled not to find the Secretary of State's evidence the appellant did not face ill-treatment on return to Turkey was justified and concluded that:-

> "In light of all the evidence, notwithstanding the seriousness of those offences, it was open to the panel to find that this was a situation where the proposed deportation was not proportionate and therefore there were exceptional reasons not to deport. The remaining grounds are mere disagreement with the panel's factual findings and do not disclose an arguable error on a point of law."

24. Renewed grounds were then submitted. These claimed that:-

> "Exceptional in the case of Article 8 in the Immigration Rules means circumstances in which refusal of a claim would result in an unjustifiably harsh outcome for the appellant. It would be something that does not conform to the Rules or something that is unusual. In this case the Tribunal has found the appellant's case exceptional because of the claimed risk of a prison sentence in Turkey following an unfair trial in his absence. While that may be an unusual circumstance, it is not something that would lead to an unjustifiably harsh outcome and it is submitted that it is therefore not exceptional such as to be disproportionate."

25. They argued, moreover, that the panel had failed to resolve the conflicting evidence regarding the appellant's risk of further trial or imprisonment in Turkey and had failed to give adequate consideration to the severity of the appellant's offences and in

particular the index offence. The grounds further refer to the judgments in **EB (Kosovo) [2008] UKHL 41** arguing that the Tribunal were wrong to place weight on delay and had failed to place appropriate weight on the public interest in removal as emphasised in the judgement in **MF (Nigeria)** [2013] EWCA Civ 1192.

26. Upper Tribunal Judge Craig granted permission to appeal. He stated:-

> "Although the determination is both thorough and detailed, and although the panel have referred to the relevant authorities, including in particular the Tribunal decision in **MF (Nigeria)** (subsequently substantively upheld in the Court of Appeal) and the Court of Appeal decision in **SS (Nigeria)** it is at least arguable that where at paragraph 66 the panel stated that 'we cannot confidently state that the appellant will not be made to serve a sentence simply as a result of the statute of limitations' and that 'we find there is a real risk of breach of Article 6 and 8 if the appellant were returned to Turkey' the panel was applying the wrong standard of proof. As the risk of a breach of Article 6 would appear to have been a factor in the panel's consideration of proportionality, in a finely balanced case such as this it is arguable that if there was an error, that error was material."

27. In granting permission on the point of the standard of proof, Judge Craig was focussing on a point that had not been raised in the grounds of appeal.

28. In his submissions to me, Mr Nath relied on the grounds of appeal before turning to the judgment of the Court of Appeal in **SS (Nigeria)** where he referred to paragraph 53 of that judgment in which Laws LJ had stated:-

> "The importance of the moral and political character of the policy shows that the two drivers of the decision makers margin of discretion – the policy's nature and its source – operate in tandem. An Act of Parliament is any way to be specially respected; but all the more so when it declares policy of this kind. In this case, the policy is general and overarching. It is circumscribed only by five carefully drawn exceptions, the first is violation of a person's Convention/Refugee Convention rights…. Clearly Parliament in the 2007 Act has attached very great weight to the policy as a well justified imperative for the protection of the public and to reflect the public's proper condemnation of serious wrongdoers."

29. Mr Nath emphasised the seriousness of the appellant's offence and the length of his prison sentence and stated that the appellant's sentence was at the top end of the sliding scale of the seriousness of criminality.

30. He stated that although the Tribunal had referred to the head note of the determination in **MF (Nigeria)**, there were not exceptional circumstances in that the appellant did not know where he was wife was and that there was nothing to show that he could not run his business from Turkey.

31. He emphasised that in the letter of refusal dated 18 December 2012, the issue of the statute of limitations in Turkey had been raised and that there was evidence that the appellant could not be tried now for the offences which he had committed in 1986.

He finally emphasised that the Tribunal were wrong to place weight on the delay in the deportation proceedings, stating that it was evident from his file that there had been various enquiries made, particularly with regard to the extradition proceedings and that had delayed the final decision.

32. Mr Miah, in his reply, argued that Mr Nath was attempting to reargue the facts of the case and that the grounds of appeal and submissions from Mr Nath did not show any material error of law in the determination. He asked me to place weight on the reasons for refusing the application given by Designated Judge McCarthy. He referred to the fact that the appellant had been convicted in absentia and there was nothing that had been put forward by the Secretary of State to indicate that he would not be imprisoned on return.

33. He stated that the Tribunal had properly looked at the relevant case law and reached conclusions thereon and it was clear from the determination that they had had adequate regard to the Rules. He referred to letters from the prison officers and other documents in the appellant's bundle which spoke highly of the appellant as a reformed character and stated that it was clear that the appellant was no longer a risk to society. There were clearly strong indicators that it would not be appropriate to deport the appellant. The fact that the appellant's deportation might imperil the careers of the fourteen full-time staff which the appellant had was a further factor to be taken into account.

34. He argued that the Tribunal were entitled to reach the findings which they had and in particular they were entitled to find that the appellant's removal on deportation and the trial and prison sentence which he might receive in Turkey was an exceptional factor. They had taken into account the Country of Origin Information Report in the bundle and there was also the opinion of the Turkish lawyer in the bundle on which they were entitled to rely. There was clear evidence that the limitation period could be extended in Turkey and therefore arguments that the limitation period was over and the appellant could not be prosecuted or imprisoned were clearly wrong.

35. In reply, Mr Nath emphasised that Article 8 should not be a "trump card" and furthermore that the Tribunal's consideration of Article 6 factors was incorrect. He also argued that the Tribunal who had said that they had allowed the appeal against the decision under the Immigration Rules was clearly wrong given that they had found that paragraph 399 and 399A did not apply to the appellant.

Discussion

36. I deal first with Mr Nath's final point which is a consideration of paragraph 42 of the determination. In that paragraph the Tribunal stated that paragraph 399 and 399A did not apply to the appellant because he did not fall within paragraph 398(b) or (c). They went on, however, to say that it would only be in exceptional circumstances that the public interest in deporting the appellant would be outweighed by other

factors. The reference to "exceptional circumstances" is a reference to that term in the Rules. While the language of the Tribunal may be infelicitous, the reality is that having found that the appellant could not succeed under paragraphs 398(b) or (c) they were entitled to consider whether or not there were exceptional circumstances which meant that the public interest in deportation should be outweighed by other factors. They clearly found that those exceptional circumstances exist and therefore that the appellant was entitled to succeed under the Rules, notwithstanding the fact that he did not fall within the provisions of paragraphs 399 and 399A because he did not fall within paragraph 398(b) or (c).

37. In considering whether or not such exceptional circumstances existed, it was incumbent upon the Tribunal to take into account a wide range of factors – an assessment which is akin to that under the fifth question in **Razgar**.

38. One issue which clearly they did not consider was determinative was the delay that had taken place between the appellant being released from prison and the decision to deport. The judgment in **EB (Kosovo)** makes it clear that delay of itself is irrelevant in the proportionality exercise – what delay does is enables an appellant to build up private and family life which might lead to a decision of being disproportionate. In any event, the Tribunal clearly did not find that the issue was determinative.

39. They did take into account the fact that they considered, having read the evidence and having heard from Mr Mealyer that there were strong factors which weighed in the appellant's favour. These included not only the business which the appellant had set up and the fact that he employed people here but also the voluntary work which he was undertaking. They were entitled, moreover, to take into account the various references which they had before them.

40. The parole board report of 20 March 2007, which set out a number of risk factors, described the appellant as a model prisoner who had not accrued any adjudications or positive drug tests and who had enhanced status. He had completed the Ley Prison Programme and IPT with favourable reports and attended AA and NA meetings on a regular basis. The report stated that he had a good understanding of the victim perspective and of drugs on society as a whole. Weighing up all factors, the parole board recommended that he be granted parole.

41. The parole assessment report on which the parole board recommendation was made referred to the OASys assessment which put the appellant's risk of reconviction as low and stated that if he remained drug free the risk of harm to others was very low. The conclusion of the seconded probation officer was:-

> "I feel quite confident that if he is permitted to stay in this country he will be able to build a very different and offence free life in Oxford and is therefore a suitable candidate for release on parole."

42. There is a further positive report from a probation officer, Rosalie Peazer, dated 13 July 2007 and a letter from Anna Thorpe of the CARAT team at HMP Ford which

referred to the appellant's behaviour since arrest as being exemplary and his consistently negative voluntary and mandatory drug tests. Ms Thorpe also said:-

> "In my time working with offenders I have never had someone inspire me as much as this man. I rarely become sentimental about my clients but, over the past three years, I stopped considering Burak as a client and started considering him as a true friend whom I trust 100%. If you have the opportunity to talk to this man you will understand why. Burak has won the hearts of so many since his early recovery, including many members of Narcotics and Alcoholics Anonymous who now consider him as a friend…
>
> Whilst I am sorry to admit I consider myself quite judgmental when it comes to foreign nationals being able to stay in the country, Burak is completely a different matter as far as I am concerned. This is not just due to the fact that I care deeply for this man. It is more because I truly believe Burak will be an asset to this country, especially when it comes to helping others as he has a gift. Burak has paid the punishment for his crime and I feel he does not deserve to be punished further by being put at risk in a Turkish prison."

43. The RAPT report of May 2007 stated:-

> "Normally we employ peer supporters for a maximum six months. However Burak became such a valued asset to us that we created a new position for him and he became a roving RAPT representative. He was given special security clearance to move around having access to addicts on other wings who may be suitable for our programme. He has become well known in the prison where he is respected and liked. He has become a source of inspiration to many addicts who have come to us."

44. These reports plus the fact that the appellant is employed and employs others are strong evidence which weighs in the balance against deportation. However, the reality is that the appellant's crime and the length of sentence he received weighs very heavily indeed in the opposite direction. Absent any other factors, deportation would clearly be appropriate in this case. I do not consider that the positive factors in this case as set out above amount to factors that would really be called "exceptional".

45. However, there is a further factor in this case which is the fact that on return to Turkey the appellant might face imprisonment or indeed further trial. In the letter of refusal, the Secretary of State set out reasons why the limitation period would mean that the appellant might not be at risk on return. However, the Tribunal considered that those assertions were countered in the detailed opinion from the Turkish lawyer, from which the Tribunal quoted in paragraph 63 through 65. While that report stated that after 31 May 2001 the legal case could be time barred it did state that the appellant would be unlikely to be able to defend himself and that that could result in heavy prison sentences.

46. The Tribunal took into account the COI response to the question posed by the respondent regarding the statute of limitations. That referred to a report dated 18 March 2012 which stated:

> "Turkey made amendments to the Turkish penal code (TCK) in 2005, which extended the statute of limitations in criminal cases; however, jurists believe that the country can further extend or totally remove the statute of limitations in certain criminal cases to make sure that justice is fully served…"

I consider that they were entitled to consider that there was a real risk that the appellant might be tried in Turkey and that the trial would not be fair and therefore he might be imprisoned unjustly. Whereas, in granting permission to appeal Judge Craig indicated that he felt that he considered that the Tribunal were wrong in the standard of proof which they used – an issue which I have stated above was not raised in the grounds of appeal – the reality is that what the appellant would be likely to face – and which the Tribunal clearly found there was a real risk of his facing – was unfair treatment in Turkey which would, in effect, be contrary to his rights the ECHR.

48. The Tribunal were clearly fortified in their conclusions by the judgment of Lord Justice Rose in the extradition proceedings. In paragraph 60 they noted that the High Court had found that the extradition proceedings were unjust and oppressive. In his judgment Rose LJ took into account a number of decisions of the European Court of Human Rights in which, having referred to the proceedings in Turkey, he said that:-

> "27. …The history of this matter, as I have set it out, in my judgment demonstrates both oppression and injustice if the applicant were to be returned to Turkey. Length of delay in this case is not only enormous in itself, in that fifteen years or thereabouts has lapsed since the criminal conduct is said to have taken place, but there have been many, many years during which the Turkish Government has made no significant attempt to obtain the applicant's extradition.
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> 28. Having regard to the unsuccessful attempts made to extradite him from Belgium (and it may be that also an unsuccessful attempt to extradite him from Greece in 1998), the whole history of this matter is such as to demonstrate oppression resulting from delay in his case.
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> 29. Equally, not withstanding the validity of Ms Malcolm's submission as to the possible availability of opportunity to the applicant to retain relevant documentation and identify witnesses, this fifteen year time lapse seems to me one which demonstrates it would be unjust if the subject were returned to face a trial, even leaving aside a limitation aspect of this matter to which I have already sufficiently referred."

47. It simply cannot be said that there were no exceptional circumstances in this case. The issue of what might happen to the appellant on return was clearly exceptional. It

is unusual as was clearly indicated by the email sent by John Miers of the respondent to the CCT process team on 17 April 2009 where he stated that:

> "What I need to know is whether we can seek to deport to Turkey after the sub *(sic)* has been granted a writ of habeas corpus permitting his extradition to Turkey. Clearly we would need to refer to this in any decision and would also need to give reasons as to why we feel deportation is appropriate, even with the earlier extradition proceedings in mind."

48. These must be exceptional circumstances and I consider that the Tribunal properly referred to relevant case law and indeed clearly in their determination placed weight on the seriousness of the appellant's offence to which they referred in paragraphs 3 and 59 in which they stated that there was a strong argument that the public interest would be served if the appellant were deported as a result of the serious offence as a deterrent to others. The Tribunal concluded, however, that, combined with positive factors to which I have referred earlier, the fact that there was a real risk that the appellant might face oppression and injustice if returned to Turkey was sufficient to make this a case that was exceptional and that therefore the deportation of the appellant would not be appropriate.

49. The Tribunal clearly had in mind the correct test and reached a conclusion which was fully open to them.

50. I bear in mind the judgment of Carnwath LJ in **Mukarkar [2006] EWCA 1045** and the guidance therein that it is not for another judge to substitute his own decision for that of a First-tier Tribunal, merely because he might reach a different decision.

51. I have concluded that the Tribunal did take into account all relevant factors and it was simply wrong for the grounds of appeal to argue that they were incorrect to find there were exceptional factors in this case.

52. I therefore find that the decision of the First-tier Tribunal shall stand and therefore the appeal of the Secretary of State is dismissed.

Decision

53. The appellant's appeal against the decision to deport is allowed on both immigration and human rights grounds.

Signed Date
Upper Tribunal Judge McGeachy