



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/16137/2013

THE IMMIGRATION ACTS

Heard at Columbus House, Newport
On 18 February 2014

Determination Promulgated
On 4 March 2014

Before

UPPER TRIBUNAL JUDGE POOLE

Between

SEZGIN OZDEMIR
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss P Solanki of Counsel
For the Respondent: Mr Irwin Richards, Home Office Presenting Officer

DECISION NOTICE AND REASONS

1. In this appeal I will refer to the appellant and the respondent in the same order as they were referred to in the First-tier Tribunal.
2. The appellant is a citizen of Turkey born 25 July 1982. He applied to vary his leave to remain under the ECAA (Association Agreement) with Turkey. The application was

refused in April 2013 as the respondent was not satisfied the appellant met the requirements of the appropriate paragraphs of the Immigration Rules. The appellant appealed that decision and his appeal came before Judge of the First-tier Tribunal Burnett sitting at Newport on 12 November 2013. At that hearing the appellant attended but was not legally represented. A Home Office Presenting Officer represented the respondent.

3. In a determination promulgated in November 2013 Judge Burnett dismissed the appellant's appeal under the ECAA and the Immigration Rules but allowed the appeal on human rights grounds.
4. The respondent then sought leave to appeal on the one ground that there had been a failure to give reasons or adequate reasons for findings on a material matter.
5. In amplifying this alleged failure the respondent contended that the judge had failed to consider the merits of the appellant's Article 8 rights under Appendix FM to the Rules. It was noted that the appellant had not faced persecution in Turkey due to his sexuality and both he and his partner had demonstrated a willingness to return to Turkey together. The judge had therefore failed to identify any insurmountable obstacle to their relationship continuing in Turkey and had failed to identify any exceptional circumstances which would render the appellant's removal disproportionate.
6. Paragraph 2 of the grounds simply amplifies the question of "insurmountable obstacles", paragraph 3 refers to the case of **MF (Nigeria) v SSHD [2013] EWCA Civ 1192**.
7. In granting leave to appeal, Judge of the First-tier Tribunal Blandy recorded:-

"I do find the grounds to be arguable. The Judge nowhere acknowledges the importance of the public interest and I find it to be arguably an error of law to have substantially based his reasoning upon *obita* comments in the case of Zhang referred to in paragraph 53 of the determination. I do find it arguable that the overall decision was inadequately reasoned and permission to appeal must be granted."

8. Hence the matter comes before me in the Upper Tribunal.
9. Mr Richards relied upon the grounds seeking leave. Mr Richards referred to paragraph 51 of the judge's determination wherein he indicates "it is debatable whether these requirements in the new Rules (Appendix FM) could be applied to a Turkish national given the ECAA". Mr Richards indicated that in saying this the judge was wrong. The Ankara Agreement is only a relaxation of the rules regarding settlement applications. No balancing exercise was conducted and no element of public interest was discussed. This amounted to a fundamental error of law and the decision should be set aside.

10. Miss Solanki referred to a skeleton argument that was submitted at the start of the hearing. Miss Solanki referred to paragraph 51 and said that it did not amount to a material error of law. Paragraphs 43 to 54 of the determination show a balancing act and the public interest is mentioned at paragraph 50. The determination is sound upon the basis that we can now see why the judge came to the conclusion. There were reasoned conclusions. The new Rules do not defeat an Article 8 claim.
11. In reply Mr Richards referred to paragraph 46 of the determination indicating a balancing act but nowhere below is such an act conducted.
12. At this stage I rose to consider the matter further and to look at Miss Solanki's skeleton argument. I note that document supports the findings of Judge Burnett and that the judge did take into account the new Rules, properly operated the five-stage test set out in Razgar and makes reference to the Ankara Agreement.
13. Upon returning to court I indicated that I considered the determination did contain a material error of law and the decision in respect of the appellant's human rights claim should be set aside. I now give my reasons.
14. It is clear that at paragraph 42 of the determination the judge properly recorded that the appellant relied upon his relationship with his partner, Mr Smith. The determination had previously noted discrepancies and inconsistencies in the evidence of the appellant but this relates more to the appellant's appeal under the Ankara Agreement decision than with regard to the appellant's human rights appeal.
15. Paragraph 46 of the determination notes the necessity to carry out a balancing act but it is certainly not clear from the ensuing paragraphs that the judge carried out such an act and certainly does not mention the public interest. He does not set out what that interest is but merely records the strengths and weaknesses in the appellant's evidence.
16. At paragraph 51 the judge records that it is debatable whether Appendix FM applies to a Turkish national, however that comment is left "hanging in the air". No conclusion is reached and no examination of Appendix FM is carried out. Paragraph 48 of the determination shows that the judge found that both the appellant and Mr Smith were willing to relocate to Turkey together and the judge found that it was not dangerous for him to go to that country.
17. Overall the judge in the determination does not show that he has adequately weighed up the appellant's circumstances as opposed to the public interest and has not adequately reasoned why the appellant's situation is such that it overrides the interests of the public. This is a material error of law and the judge's decision in respect of Article 8 must be set aside.
18. Prior to the hearing the appellant's new representatives had lodged a large number of documents and Miss Solanki indicated that she wished Mr Smith's mother to give

evidence and she was not available. It therefore falls within the category of cases mentioned in the Practice Statement of the Senior President for this matter to be remitted to the First-tier Tribunal.

19. The findings and decision of Judge Burnett in respect of the appellant's appeal under the Rules via the Ankara Agreement are preserved and will stand.
20. No anonymity direction was sought and I do not make one.
21. The appeal is remitted to the First-tier Tribunal to be heard by any judge other than Judge Burnett, the listing to be at the direction of the appropriate Resident judge.

Signed

Date

Upper Tribunal Judge N Poole