



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

Appeal Number: OA/25012/2012

**THE IMMIGRATION ACTS**

**Heard at Birmingham**

**On 3 April 2014**

**Determination**

**Promulgated**

**On 22 April 2014**

**Before**

**UPPER TRIBUNAL JUDGE KING TD**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**and**

**VELAT TURAN**

Appellant

Respondent

**Representation:**

For the Appellant: Mr Mills, Home Office Presenting Officer

For the Respondent: Mr Wray, Counsel instructed by Kings Court Chambers

**DECISION AND DIRECTIONS**

1. The claimant is a citizen of Turkey. On 31 August 2012 he applied for entry clearance with a view to settlement in the United Kingdom with his wife and sponsor, Miss Emma Jones, who is a British citizen residing in Dudley.

2. The application was considered under the Immigration Rules but was refused on 7 November 2012 because the financial requirement was not met.
3. The claimant sought to appeal against that decision, which appeal came before First-tier Tribunal Judge Holmes on 25 October 2013.
4. Having heard the sponsor and her sisters give evidence the Judge allowed the appeal under the provisions of Article 8 of the ECHR.
5. The Secretary of State for the Home Department sought to appeal against the decision on the basis that the Judge had adopted an incorrect approach to Article 8 of the ECHR, particularly in the light of recent jurisprudence, and had failed to apply the appropriate test to the evidence.
6. Leave to appeal was granted on the basis that it was of public importance that the proper considerations be applied and the proportionality balance be properly considered.
7. Thus, the matter comes before me in pursuance of that grant.
8. Mr Mills, who represents the Secretary of State for the Home Department, said that as the claimant failed to meet the Immigration Rules it was necessary to consider Article 8 within the framework of the jurisprudence, particularly that set out in **Shahzad (Article 8: legitimate aim) [2014] UKUT 00085 (IAC)** and also set out in the case of **Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 00064 (IAC)**.
9. Although the Judge cited **MF (Nigeria)** at paragraph 16 and found no rational basis and no authority that all the stages of the exercise could be conducted within the scope of the Immigration Rules. She went on to indicate:

“What is important is the substance of the exercise, firstly considering whether an applicant’s family and private life are such as to satisfy Appendix FM and paragraph 276ADE of the Rules, and if not, secondly conducting an assessment of Article 8 applying the criteria established by law under the Human Rights Act 1998.

The Judge then moved on to consider Article 8 in accordance with the established jurisprudence. In paragraph 20 the Judge commented as follows:-

“On the evidence to which I have referred, I find that the respondent’s decision fails to respect established family life, bearing in mind that, as stated by the Court of Appeal in **AG (Eritrea) [2007] EWCA Civ 801** and in other cases, the threshold of engagement of Article 8 is not specifically high.”

10. The Judge makes further considerations of Article 8 in paragraph 21. Mr Mills submits that that is to fundamentally misunderstand the importance which is now to be given to the public interest as enshrined in the Immigration Rules. It will only be in the most compelling circumstances falling outside the Rules that Article 8 would be engaged. Far from being a low threshold Article 8 is only now to be engaged when there are compelling circumstances for it to do so.
11. He submitted, therefore, that the approach taken by the Judge was fundamentally flawed and invited me to set aside the decision to be re-made.
12. Mr Wray, who represents the claimant, invited me to find that whatever might have been the approach taken by the Judge it was irrelevant in the face of the factual findings that were made.
13. It is difficult to imagine, he submitted, that the circumstances as set out in paragraph 19 of the determination were not otherwise of a compelling nature. The sponsor had low self-esteem and relied upon the support of her husband. She missed him very much as a result of which she was suffering anxiety and depression, not only on that account but also because she had lost her mother shortly before the marriage and was still coming to terms with that. She was also having difficulty controlling her diabetes. She relied heavily upon her two sisters for support.
14. My attention was drawn to paragraph 22 of the determination in which the Judge concludes that it would not be reasonable to expect the sponsor to go to Turkey to be with her husband. Therefore it is entirely understandable, given the compelling circumstances, that the appeal was allowed.
15. I consider in particular the case of **Gulshan** and what was said in paragraph 27 thereof as follows:-

“The Judge then embarked on a free-wheeling Article 8 analysis, unencumbered by the Rules. That is not the correct approach. The Secretary of State had addressed the Article 8 family aspects of the respondent’s position through the Rules, in particular EX.1, and the private life aspect through paragraph 276ADE. The Judge should have done likewise, also paying attention to the guidance. Thus the Judge should have considered the Secretary of State’s conclusion under EX.1 that there were no insurmountable obstacles preventing the continuation of family life outside the United Kingdom. Only if there were arguably good grounds for granting leave to remain outside the Rules was it necessary for him for Article 8 purposes to go on to consider whether there were compelling circumstances not sufficiently recognised under the Rules.”

16. The position as advanced on behalf of the Entry Clearance Officer had been that the appellant failed to meet the Rules but there was no reason at all why family life could not be continued in Turkey.
17. I find to some extent that the argument, as set out by the Judge in paragraph 22 on the issue of return to Turkey, to be somewhat circular. In general terms it was the evidence that the sponsor misses the support of her husband in the United Kingdom. She suffers from stress and depression and a number of matters not all related to the absence from him but largely so. It is understandable in the separation that she relies upon her sister. It is entirely apparent from the evidence that some of those difficulties, if not most of them, would be resolved were the sponsor to be reunited with her husband. If that was so then clearly there would be no necessity for her sisters to accompany her to Turkey.
18. The Judge comments that the sponsor has no pre-existing family, cultural or social links with Turkey except as a place to visit on holiday. That ignores the fact however that she has now married a Turkish citizen who lives in Turkey. There is no detail whatsoever in any of the papers as to what the appellant does for a living, whether he works or what his lifestyle is and whether he has any family in Turkey. There is no indication one way or the other as to the ability of the sponsor to live with him in Turkey with his family.
19. It seems to me that the precise difficulty in this case is that the Judge has not followed the guidance that has been set out in the recent authorities.
20. The first question that falls to be considered is whether the appellant meets the Immigration Rules. Clearly the answer is no and that was noted by the Judge. That being said, the second issue was whether there were the compelling circumstances outside the Immigration Rules which called into operation Article 8.
21. Part of the analysis of the situation will be to consider the situation of the appellant in Turkey and that of the sponsor in the United Kingdom. Was it not reasonable for the sponsor to live with her husband in Turkey? If the answer is that it was unreasonable or unduly harsh to expect her to do so, then that would bring into sharper relief what factors were compelling such that he should join her.
22. As I indicated to the sponsor and to her representative, it was very unfortunate that so much time has elapsed for the resolution of this particular application. Clearly the sponsor is very upset and indeed was distressed at the hearing as to the continuing separation of herself from her husband. The issue which seems not to have been explored in any detail or at all is why she cannot join him in Turkey. Sadly both her parents are dead. Currently she lives with her sisters who provide her with support. Equally no doubt she would prefer to live with her husband and have his support.

23. It seems to me, however, that the Judge has erred in law in the approach to be taken to Article 8 and that it is in the interest of all parties and in the interest of fairness that a proper approach is adopted to the facts that are found. Thus, with some reluctance, I set aside the decision.
24. I say with some reluctance because there is little doubt that the matters set out in paragraph 19 would, within their proper context, be matters that could support the view that the situation was a compelling one.
25. What is absent, however, is any analysis of the proposition that the sponsor can live with the appellant in Turkey.
26. I canvassed with the representatives whether it was appropriate for me to re-hear the case, taking evidence from the sponsor as to the circumstances of her husband in Turkey, in order perhaps to resolve that particular issue. It was felt, however, particularly by Mr Wray, that it would be a fairer course to have a full re-hearing before the First-tier Tribunal, giving the appellant time to provide the appropriate evidence that is at present lacking.
27. In the circumstances therefore the decision is set aside to be re-made before the First-tier Tribunal. I indicate that it would be fair to all parties concerned that that date is not prolonged into the future. I understand from Mr Mills that there is to be an expedited hearing the case of **MM** by the Court of Appeal. It seems to me, however, that the justice of this situation does require a finding one way or the other in what has been a protracted appeal. The appellant and sponsor are entitled to know at an early stage the outcome of the appeal and to be reunited if that be the outcome that is decided upon.
28. I indicated that at the renewed hearing it would be the expectation that there would be evidence, particularly from the appellant, as to his situation and circumstances in Turkey and details of his family and relatives. There is a need to set out why it is that he does not consider it possible that he and the sponsor can have a married life in Turkey.
29. Similarly, I understand that the financial situation of the sponsor has improved to some extent since the application was made and that she has further employment. That may or may not be a relevant consideration in the overall assessment as to proportionality but no doubt evidence as to her currently situation and circumstances should be obtained.
30. I indicated to the parties that the evidence and the findings of the Judge in relation to paragraph 19 should stand. There is no suggestion whatsoever of any lack of credibility on the part of the sponsor or her witnesses and that is a matter which in fairness to her should be preserved.
31. The real issue, as I have indicated, is to determine whether or not there are insurmountable obstacles preventing family life being enjoyed with the appellant in Turkey or whether to expect the sponsor to do so would be

unreasonable or unduly harsh in all the circumstances. If the answer to that question is yes then it is necessary to consider whether there are factors so compelling outside of the Immigration Rules that would lead to Article 8 being applied. Such evidence should be presented not later than seven days before the hearing.

32. I would simply add, without prejudice to the final outcome that this would seem to be a case that has considerable merit to it and that the continuation of the case is causing great distress both to the sponsor and to her family. I would in those circumstances invite the Secretary of State for the Home Department to look again at the features of this case, particularly those set out in paragraph 19 of the determination to see whether or not there is a necessity for a final litigation of this matter at the hearing or whether as a matter of compassion this issue can be resolved earlier than that.

Signed

Date

Upper Tribunal Judge King TD