Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: IA/26571/2015**
IA/26064/2015

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 20 October 2017	**On 15 November 2017**

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE GRUBB

Between

SULEYMAN KILINC
ESEN KILINC

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr H Dieu, instructed by NLS Solicitors
For the Respondent: Mr I Richards, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The first and second appellants are husband and wife who were born respectively on 26 January 1983 and 1 October 1984. They are both Turkish nationals.

2. The first appellant arrived in the United Kingdom as a Tier 4 Student in 2010 with leave valid until 24 November 2010. On 23 November 2010, he applied for leave to remain in the UK on the basis that he had established a business and sought leave under the Turkish EC Association Agreement ("ECAA"). His application was successful and he was granted leave until 24 January 2012. On 24 January 2012, he made application for further leave to remain under the ECAA and he was granted

leave until 24 January 2015. On 22 January 2015, the first appellant made an application for indefinite leave to remain under the ECAA. That application was refused on 26 June 2015 and a decision to remove him by way of directions under s.47 of the Immigration, Asylum and Nationality Act 2006 was made.

3. The second appellant entered the United Kingdom on 3 September 2013, with leave valid until 24 January 2015 as the first appellant's spouse. On 22 January 2015, the second appellant made an application for indefinite leave to remain as the spouse of the first appellant under the ECAA. That application was refused on 26 June 2015 and a decision taken to remove her by way of directions under s.47 of the Immigration, Asylum and Nationality Act 2006.

4. Both appellants appeal to the First-tier Tribunal. Judge Suffield-Thompson dismissed each of their appeals.

5. On 1 March 2017, the First-tier Tribunal (Judge Bird) granted each of the appellants permission to appeal to the Upper Tribunal.

The Judge's Decision

6. Before Judge Suffield-Thompson, it was common ground that the appellants' appeals were governed by the application of the Immigration Rules in force on 1 January 1973, namely HC 510. The relevant paragraphs are paras 4 and 28 of HC 510.

7. Paragraph 28 provides:

> "A person who is admitted in the first instance for a limited period, and who remains here for 4 years in approved employment or as a businessman or a self-employed person or a person of independent means may have the time limit on his stay removed unless there are grounds for maintaining it. Applications for removal of the time limit are to be considered in the light of all the relevant circumstances, including those set out in paragraph 4. …".

8. Paragraph 4 of HC 510 provides:

> "In deciding these matters account is to be taken of all the relevant facts; the fact that the applicant satisfies the former requirements of these Rules for stay, or further stay, in the proposed capacity is not conclusive in his favour. It will, for example, be relevant whether the person has observed the time limit and conditions subject to which he was admitted; *whether in the light of his character, conduct or associations it is undesirable to permit him to remain*; whether he represents a danger to national security; or whether, if allowed to remain for the period for which he would stay, he might not be returnable to another country." (our emphasis)

9. Before the judge, as in her decision, the Secretary of State relied upon the first appellant's conviction for "wounding/inflicting grievous bodily harm" on 22 March 2013 for which he had been sentenced to a period of 24 weeks' imprisonment, suspended for twelve months.

10. In her decision, the judge set out the first appellant's offence and then considered its relevance under the 1973 Rules as follows:

> "29. The Appellant was sentenced, at Swansea Crown Court, on 23 August 2013, of an offence for Grievous Bodily Harm (*sic*) where he was sentenced to a custodial sentence of 24 weeks which was suspended for 12 months. The offence occurred when there was an altercation in the Keebab Shop owned by the 1st Appellant. It resulted in the Appellant head-butting the victim and slapping him which caused him to fall to the floor hitting his head. Although the Appellant's probation report states he is at low risk of reoffending I find this is not the key factor here. Firstly, this was the Appellant's first offence but it was a violent offence of extreme seriousness, hence he received a custodial sentence. It may be that the Probation said he is at low risk of reoffending but due to the nature of the offence the risk of harm if he were to reoffend is, I find, very high.
>
> 30. There is no legal definition of "conducive to the public good" so I am assisted by the Sentencing Threshold as the 1st Appellant falls into the group of those who were convinced of an offence and sentenced to imprisonment for less 12 months, and seven years has not passed since the end of the sentence.
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> 31. Although his Pre-Sentence reports says he is remorseful he was questioned about this by the Respondent's representative and he did not come across as remorseful nor did he seem to comprehend why this offence would have such serious consequences for his Immigration Application.
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> 32. I find that the 1st Appellant has committed a very serious act of violence with no significant mitigating features. It was an offence serious enough for a Crown Court disposal and he was given the highest penalty possible which was a custodial sentence and I find he was fortunate to have appeared before a Judge minded to impose a suspended sentence as others would have not been so lenient.
>
> 33. His representative argues that he has a flourishing business and has made his life in the UK. None of this, I find, has any relevance in relation to whether or not he is a person of good character. I find that he should not be allowed to remain in the UK as he has breached the Rules by committing a serious offence here in the UK."

11. Having dismissed the first appellant's appeal under the 1973 Rules, the judge went on also to dismiss the second appellant's appeal under the Rules and both appellants' appeals under Art 8.

The Error of Law

12. Before us, Mr Richards did not seek to defend the judge's decision, in particular her reasoning in para 32 of her determination. He was, in our judgment, clearly right not to do so.

13. In our judgment, there are a number of errors in the judge's reasoning in para 32. First, the judge mischaracterises the nature of the first appellant's offending. It does not appear that the judge had any information before her other than the fact of conviction and sentence imposed by the Crown Court Judge. The facts are recited by the judge at para 29. This was undoubtedly a serious assault, involving head butting by the first appellant. It would appear, though it is not clear from the papers and was not clarified before us, that the appellant was convicted of the offence under s.20 of the Offences against the Person Act 1861. That is an offence with a maximum sentence of seven years' imprisonment. Whether there were any "significant

mitigating factors" – which the judge states there were not – could not be known by the judge in the absence of supporting documentation relating to the conviction, for example the sentencing judge's remarks. These were not, so far as we are able to tell, before the judge. Secondly, to describe the penalty imposed as the "highest penalty possible", flies in the face of the fact that the penalty was 24 weeks' imprisonment and it was suspended for twelve months. It was of a relatively short duration and not an immediate custodial sentence. Thirdly, we are unable to fathom on what basis the judge commented at the end of para 32 that it was "fortunate" that the first appellant had appeared before a judge who was minded to impose a suspended sentence when others might not have been so lenient. We do not know any basis upon which the judge could assert that matter. The judge was in no position to 'second guess' the sentence imposed by the Crown Court Judge who would, undoubtedly, have had all the relevant material before him in considering that the appropriate sentence was one of 24 weeks' imprisonment but nevertheless that it should, in the circumstances of the first appellant, be suspended for two years. We note that a suspended sentence was the recommendation by the Probation Service in the Pre-Sentence Report (PSR) dated 12 August 2013. It is clear to us that in para 32 the judge has failed properly to consider the nature and circumstances of the first appellant's offending in concluding that, and taking into account that, his "conduct" was such as to make it "undesirable to permit him to remain" in the UK.

14. We also have concerns about the judge's approach to the appeal in paras 29 and 30 of her determination. Dealing first with para 30, it is not clear to us why the judge was concerned with the legal definition of "conducive to the public good", a phrase relevant in the context of deportation and some Immigration Rules, but not relevant to this appeal.

15. Further, in relation to para 29, whilst the judge accepts on the basis of the PSR that the first appellant has a "low risk of reoffending", the judge's characterisation of any "risk of harm" if he did reoffend as "very high", is difficult (if not impossible) to square with the only relevant evidence before her, namely the PSR, which stated that the first appellant posed a "medium risk of serious harm" to the public if he reoffended.

16. For the reasons we have given, and which we indicated at the hearing, the judge materially erred in law and, that decision, together with that of the second appellant cannot stand.

Remaking the Decision

17. In remaking the decision, we take into account the first appellant's established business in the UK since 2010. It has never been suggested by the Secretary of State that he is not engaged in a genuine business in the UK. He has been in the UK on that basis, now, for almost seven years. Paragraph 28 of HC 510 states, as we set out above, that applications for the removal of a time limit (namely an application for ILR as in these appeals) must be considered in the light of all the relevant circumstances, including those set out in para 4 of HC 510.

18. The only matter taken against the first appellant by the Secretary of State in her decision is the first appellant's offence. That is a single offence committed in 2013. The sentence imposed by the Crown Court Judge was very much at the lower end of the custodial range and was, in any event, suspended. The PSR concludes that the first appellant has a low risk of reoffending within a two year period. That period has, of course, now passed. We have carefully read the PSR which is, in very many respects, positive in respect of the first appellant's future conduct and behaviour. In a seven year period in the UK as a businessman with leave under the ECAA, there is only this single offence (albeit one of some seriousness) committed in March 2013. There has been no reoffending drawn to our attention.

19. In her determination, the judge referred to a table of "sentencing thresholds" contained within the relevant Home Office guidance, "Business applications under the Turkish EC Association Agreement" (15 October 2015) at pages 103-104. These apply to a person applying for leave or ILR on or after 13 December 2012 and state that the application "must" be refused, inter alia, where the individual has been: "convicted of an offence and sentenced to imprisonment for less than 12 months, and 7 years has not passed since the end of the sentence".

20. It is not necessary for us to consider whether this apparently mandatory refusal provision falls foul of the standstill clause in Art 41 of the ECAA in imposing a more onerous requirement than that which existed on 1 January 1973. Mr Richards accepted before us that the guidance was not binding upon the Tribunal in applying para 4 of HC 510.

21. We see no basis upon which the first appellant's appeal should not be allowed under the 1973 Rules. Taking account, therefore, of all the circumstances we have set out above, including the first appellant's offending, we are satisfied that the first appellant met the requirements of HC 510 for the grant of indefinite leave to remain.

22. Likewise, Mr Richards did not suggest that the second appellant should not succeed as the first appellant's spouse under HC 510. The basis upon which the Secretary of State refused her application was that she had not been living with the first appellant as his spouse for a period of two years. However, Mr Richards accepted that, on the evidence, she has now been living as his spouse in the UK for over 4 years since 2 September 2013. Given the respondent's position, it is unnecessary for us to explore the issue of what is the point in time at which the 4-year period must be established.

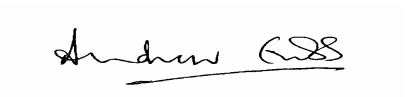
23. We are, consequently, satisfied that the second appellant meets the requirements of HC 510 for the grant of ILR as the spouse of the first appellant.

Decision

24. Thus, the decision of the First-tier Tribunal to dismiss the first and second appellants' appeals involved the making of an error of law and is set aside.

25. We remake the decision allowing both the first and second appellants' appeals on the basis that they meet the requirements of HC 510 for the grant of indefinite leave to remain.

Signed



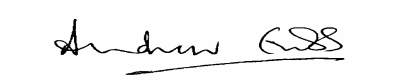
A Grubb
Judge of the Upper Tribunal

15 November 2017

TO THE RESPONDENT
FEE AWARD

As we have allowed both appeals, we consider it appropriate to make a fee award in respect of any fee paid or payable by either appellant.

Signed



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