Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12414/2016

THE IMMIGRATION ACTS

Heard at UT (IAC) Field House	**Decision & Reasons Promulgated**
On 7th June 2018	**On 26th June 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE J G MACDONALD

Between

MRS TUBA BANYANBAS
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Saeed, Solicitor, instructed by Aman Solicitors Advocates (London) Ltd
For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Turkey who applied for indefinite leave to remain here as the spouse of a person present and settled in the UK. Her application was refused

and her subsequent appeal to First-tier Tribunal Judge Moore dismissed in a decision promulgated on 19th October 2017.

2. Grounds of application were made. Ground 1 related a failure to consider and determine Article 24(3) of the EU Charter on Fundamental Rights with reference to the decision in **Abdul (Section 55 – Article 24(3)) Charter [2016] UKUT 00106**. The second ground related to the failure to consider and apply **SF and Others (Guidance, post-2014 Act) Albania [2017] UKUT 120 (IAC)**. Ground 3 related to a misdirection on evidence. Ground 4 related to the proposition that without the wilful collusion of the examination centre it would not have been possible for the Appellant to obtain the English certificate. Ground 5 contained the issue of why the Appellant could not return to live in Turkey and the Appellant's evidence had been unchallenged in that regard. No proper findings of fact had been made to determine that limb of the appeal. Ground 5 related to the decision under EX.1 of the Immigration Rules where it was said that the judge had speculated and Ground 6 related to Section 117B(6) given that the eldest of the two children had started his schooling and the judge had not considered that facet of the evidence.

3. Permission to appeal was granted and thus the matter came before me on the above date. For the Appellant it was said that it was clear following the case of **Abdul** that this was a freestanding right which the judge had not considered. Not to do so was an error in law. Furthermore, the issue of the Secretary of State's own policy had been raised before the judge but this had simply been ignored. This was not an Appellant who, in terms of the policy, had a "very poor immigration history" where she had "repeatedly" and deliberately breached the Immigration Rules.

4. I was asked to set the decision aside and remit it for a fresh hearing before the First-tier Tribunal.

5. For the Home Office it was agreed that the judge had not referred to the EU Charter on Fundamental Rights nor **SF** but had considered the best interests of the children and had concluded that they could enjoy family life together in Turkey. This was not a case where the judge was separating the family and even if he had considered **SF** he would have found that the Appellant did have a very poor immigration history having used deception to obtain the English test certificate. Given that, there was no material error in law by the judge and the decision should stand.

6. I reserved my decision.

7. It is clear enough that the judge was referred to the case of **Abdul** and in terms of the headnote of that decision by the Hon. Mr Justice McCloskey Article 24(3) of the Charter does create a freestanding right although not an absolute one. Headnote (iv) says that where the right is engaged, a failure by the decision maker and the Tribunal to acknowledge it may constitute a material error of law.

8. It is beyond doubt that having not considered it at all the judge did make an error of law even if there is an issue about whether or not that error is a material one.

9. What seems to me to be a material error in law is the fact that the judge did not consider what was set out in **SF and Others** which answers the question on whether it would be unreasonable to expect a British citizen child to leave the UK stating that, subject to exceptions, it will usually be appropriate to grant leave to the parent concerned. It is clear that this was put as part of the Appellant's case because the judge referred to it in paragraph 18 of the decision. The judge noted that both children were born here and their eldest child was due to start nursery on 27th September 2017 and the younger daughter who was approximately 1½ years of age was very close to her father and elder brother. While the judge noted the argument, there was no decision made in that regard. It seems to me that not to engage with the policy which was a significant part of the appellant's case was a material error of law and therefore the decision cannot stand and must be set aside.

10. For the Appellant Mr Saeed did not seek anything other than remittal to the First-tier Tribunal although I have decided that there is no need for fresh evidence in this case and as such I should make a fresh decision on the facts as found by the judge.

11. The case of **SF** is important because it sets out the Home office policy in a case of this nature. It is accepted in this case that the elder of the two children is of British nationality and it follows inexorably that the second child also holds British nationality.

12. Contrary to the submission of the Home Office I have concluded that the appellant does not fall into the category of someone who falls to be removed in terms of the policy. Even allowing for the fact that the judge found that she used deception in the taking of the examination I consider she cannot reasonably be said to have a "very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration rules". This is not a case where the appellant has repeatedly breached the Immigration rules. While the use of deception must be deplored it seems to me that this offence, on its own, falls below that high threshold of it being established that she has a *very* poor immigration history. No other point is taken against the Appellant as she entered the UK lawfully as the spouse of a settled person here.

13. From that finding the answer to this case is very clear – the Home Office policy is that, for this family, it would not be reasonable to expect the British children to leave the UK. In terms of the balancing act under Article 8 this goes to the very crux of the issue rendering removal of the appellant disproportionate. In light of the policy in **SF** it cannot be said that the interference with the appellant's private and family life by removing her is proportionate to the legitimate public end sought to be achieved. The Appellant therefore succeeds in this appeal on human rights grounds.

14. The decision of the First-tier Tribunal is therefore set aside. Given the use of deception by the Appellant it is not appropriate to make a fee award.

Notice of Decision

15. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

16. I set aside the decision.

17. I remake the decision and allow the appeal on human rights grounds.

No anonymity order is made.

Signed *JG Macdonald* Date 25th June 2018

Deputy Upper Tribunal Judge J G Macdonald

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award.

Signed *JG Macdonald* Date 25th June 2018

Deputy Upper Tribunal Judge J G Macdonald