



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2023-003241
First-tier Tribunal No: HU/56206/2022
LH/02255/2023

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 23 November 2023**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR RECEP COBAN
(NO ANONYMITY ORDER MADE)**

Respondent

Representation:

For the Appellant: Ms R. Arif, Senior Home Office Presenting Officer
For the Respondent: Ms. S. Khan, counsel instructed by Parker, Rhodes,
Hickmott

Heard at Birmingham Civil Justice Centre on 31 October 2023

DECISION AND REASONS

1. This is an appeal by the SSHD against a decision of First tier Tribunal Judge Hillis who allowed the appeal of the Respondent against a decision to deport him.
2. The Respondent, to whom I shall refer as the Claimant, is a national of Turkey born on 17 July 1987. On 7 November 2011 he married a British citizen in Turkey, who gave birth to a daughter in 2012. On 22 November 2013 the Claimant entered the UK. His second daughter was born in 2015 and on 5 November 2015 he was granted 30 months leave to remain on the basis of his family life, on the ten year route. He and his wife divorced in 2016.
3. The Claimant met another woman, Ms B and they began cohabiting in 2017. In October 2018 the Claimant pleaded guilty to three offences of fraud and four offences of perverting the course of justice and he was sentenced to 10 months imprisonment.
4. A decision to deport the Claimant was made and his human rights application was refused and the appeal was dismissed in a decision and reasons of First tier Tribunal Judge Malik. The deportation order was signed on 15 October 2019.
5. On 18 November 2020, further submissions were made in support of a fresh human rights claim, however, in a decision dated 26 April 2021 the SSHD refused to revoke the deportation order. On 7 March 2022 the Claimant's partner gave birth to a daughter. Further submissions were refused with a right of appeal on 30 August 2022, which the Claimant exercised on 12 September 2022.
6. The appeal came before First tier Tribunal Judge Hillis for hearing on 29 June 2023 when the Claimant and Ms B attended and gave evidence. In a determination promulgated on 13 July 2023 the appeal was allowed on the basis that the Claimant did not fall within the definition of foreign criminal but that in any event it would be unduly harsh on his three children for him to be deported and the decision to deport him was disproportionate.
7. The SSHD sought permission to appeal, in time, on the basis of the following grounds:

"3. It is submitted that the FTTJ failed to direct himself to, and apply, the elevated threshold (as established in precedent caselaw) when considering this issue.

4. In HA (Iraq), in which judgment was given on 20 July 2022, the Supreme Court found (at [41]) that, in considering whether the effect of deportation would be unduly harsh, the decision-maker should adopt this self-direction:

“... ‘unduly harsh’ does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. ‘Harsh’ in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb ‘unduly’ raises an already elevated standard still higher.”

Having given this self-direction, and recognised that it involves an appropriately elevated standard, the Supreme Court found at [44]) that it is for the decision-maker to make an informed assessment of the effect of deportation on the qualifying child or partner and to make an evaluative judgment as to whether that elevated standard has been met on the facts and circumstances of the case before them

5. It is acknowledged that the appellant has submitted a social worker’s report, dated 15 November 2022, from Lynn Coates, regarding her views on the likely effect deportation will have on both children who are described as having a ‘positive relationship’ and ‘strong bond’ with their father. However, there has been inadequate analysis by the FTTJ as to what the consequences for these children would be currently, nor what the effects of future ongoing separation might be, given that their mother is their primary carer and the fact that the appellant travelling a ‘significant distance’ weekly to see them is not of itself an exceptional circumstance, to be with his children. There is no other independent evidence aside from the social worker’s report to indicate that the children will be so detrimentally impacted which denotes severe’ or ‘bleak’.

Making a material misdirection of law – public interest

6. It is submitted that there is a public interest in deporting the appellant even though he does not fall within the definition of ‘foreign criminal’ [25], he had, none the less, committed a serious crime sufficient to warrant a custodial sentence. The FTTJ failed to provide any assessment regarding the public interest in line with the statutory framework s117B, in the proportionality exercise given that the appellant committed offences which plainly weigh in favour of his deportation but which the FTTJ has minimised at [15], with reference to the passage of time, lack of re-offence in that time and forming a new relationship with his current partner [24]. Of relevance which the FTTJ failed to consider was the fact that the appellant has established his new relationship having had no lawful basis to do so, his appeal rights having been exhausted in his previous appeal on 01 August 2019, with the expectation that he should leave the UK.

Making a material misdirection of law - procedural irregularity

7. It is submitted that the Presenting Officer (PO), representing the Secretary of State at this appeal, raised some concerns which may not have afforded her a fair opportunity to advance her case, the details of which are attached in the PO note of 30 June 2023.

8. The FTTJ had interrupted the PO's line of questioning the appellant during cross examination on relevant matters on account that it was viewed by the FTTJ as reflecting badly on the appellant's character.

9. The appellant's representative was permitted to interrupt the PO mid questioning the appellant.

10. It appeared that the FTTJ was already minded to allow the appeal.

11. Furthermore, owing to the PO arriving late to Court, on arrival, the PO found the FTTJ and representative were discussing the case.

12. All these matters indicate procedural irregularities have taken place which sets a tone of unfairness and lack of impartiality against the Secretary of State's position in line with the decision of the Upper Tribunal – [Tribunal decision \(tribunalsdecisions.service.gov.uk\)](https://tribunalsdecisions.service.gov.uk), where it is stated : (i)

'Indications of a closed judicial mind, a pre-determined outcome, engage the appearance of bias principle and are likely to render a hearing unfair.'

8. Permission to appeal was granted by First tier Tribunal Judge Grimes in a decision dated 9 August 2023 in the following terms:

"2. It is arguable, as contended in the second ground, that the judge erred in failing to have regard to the statutory considerations in section 117B of the Nationality, Immigration and Asylum Act 2002 in assessing the public interest in the proportionality exercise in this case.

3. It is further arguable, as contended in the third ground, that the judge made a procedural irregularity in his conduct of the case as set out in the statement of the Presenting Officer (undated) uploaded onto the case management system on 7 August 2023.

4. The submission in the first ground that the judge failed to direct himself to the elevated threshold is interconnected with the grounds set out above."

9. On 3 October 2023, the note dated 30 June 2023 from Ms S Tasnim, the Presenting Officer at the hearing before the First tier Tribunal was uploaded to the MyHMCTS system. On 30 October 2023, a rule 24 was lodged on behalf of the Claimant which included a witness statement from Mr Christopher Cole, solicitor, who had conducted the hearing on 29 June 2023 and a typed copy of his record of proceeding.

Hearing

- 10.. At the hearing before the Upper Tribunal Mr Cole attended in order to give evidence. I asked Ms Arif if she intended to call Ms Tasnim to give evidence in line with her note of 30 June 2023 and whether a witness statement had been prepared in line with the guidance of the former President of the Upper Tribunal in BW (witness statements by advocates) Afghanistan [2014] UKUT 00568 (IAC). Ms Arif said no witness statement had been prepared but she would endeavour to contact Ms Tasnim to see if she might be available to attend the hearing. In the event, this did not prove possible as Ms Tasnim was working from home.
11. I considered whether the hearing should be adjourned in order for Ms Tasnim to attend, as submitted by Ms Arif, however, this was strongly opposed by Ms Khan on behalf of the Claimant on the basis that it was the SSHD's appeal and that she could have attended if she wished and because the Claimant was privately funding his appeal and should not be put to the unnecessary cost of a further hearing. Also Mr Cole was in attendance and was willing and able to give evidence and had taken time out of his practice in order to attend the Upper Tribunal. I considered the submissions of both parties and concluded that it was in the interests of justice to proceed and not further delay resolution of the appeal.
12. My clerk helpfully obtained the recording of the proceedings, which were played in open court, however the sound quality was very poor and it was not possible to properly understand what was being said as it was insufficiently clear.
13. I heard submissions from Ms Arif who relied upon the grounds of appeal. She submitted that the judge had failed to direct himself and correctly apply the elevated threshold when considering whether it would be unduly harsh for his two eldest children to remain in the United Kingdom if he were deported to Turkey and there was inadequate consideration of the consequences for the children, who would remain with their mother and primary carer.
14. Ms Arif further submitted that the Judge erred in making a material misdirection in law when considering the public interest and failed to conduct a balance sheet exercise in line with ground 2. Ms Arif

further relied upon Ground 3 and the allegation of procedural irregularity. Whilst she accepted that the minute prepared by Ms Tasnim was not in the format of a witness statement she relied upon the content of that minute and submitted that the Judge lacked impartiality. She submitted that the decision should be set aside.

15. In her submissions, Ms Khan submitted that Ground 1 was misconceived given that there was an express concession in this case that the Claimant was not a foreign criminal as it was accepted that his offending did not cause harm and that he was not a persistent offender. Consequently this ground is not made out.
16. With regard to Ground 2, Ms Khan submitted that the Judge expressly took into account the nature of the offences that the Claimant had committed and the sentencing remarks of Judge Hirst. She submitted that he clearly had the public interest in mind and took into consideration the statutory public interest considerations set out at section 117B NIAA 2002.
17. As to Ground 3, Ms Khan submitted that the file note was undated although appeared to have been written the day following the hearing; that it was not signed and did not contain a statement of truth and simply did not provide anything of real substance to put forward a claim of procedural impropriety. Nor did the file note support the accusations set out at [11] of the grounds of appeal that the Claimant's representative and the Judge were discussing the case upon her arrival at the hearing room. Ms Khan stated that Mr Cole's instructions were that a brief conversation had taken place prior to the Presenting Officer's arrival, which Mr Cole then communicated to her upon her arrival.
18. Ms Khan also pointed out that [8] of the SSHD's grounds of appeal asserted that the Presenting Officer's line of questioning was interrupted by the Judge, whereas the fifth paragraph of the file note asserts that the judge and representative stopped her cross-examination on "numerous occasions" and prevented her from asking questions about the Claimant's relationship with his ex-wife. Ms Khan submitted that this was an irrelevant line of cross-examination given that the Presenting Officer had conceded that the Claimant had an ongoing parental and subsisting relationship with his two eldest children by his ex-wife and, therefore, the Judge was correct to stop this line of questioning. Similarly, in submissions the Presenting Officer was seeking to challenge the level of involvement by the Claimant with his older children and the Judge was justified in intervening given the concession made.
19. Ms Khan submitted that the manner in which this hearing was conducted was entirely different and distinguishable from that in MS (judicial interventions; complaints; safety concerns) Bangladesh

[2023] UKUT 00114 (IAC). She submitted that the Presenting Officer's file note did not demonstrate that the Judge had a closed mind and his interventions were in respect of concessions that she had already made. As to the Presenting Officer's comments in her file note that she felt deflated and anxious, the context was that she had asked for a cvp hearing on two occasions as she was travelling but these requests had been turned down. Ms Khan submitted there may well have been other reasons why the Presenting Officer might have been feeling that way and it was not enough to show that the hearing was unfair in any way. Ms Khan drew attention to the decision in Bano (procedural fairness, withdrawal of representatives) [2019] UKUT 00416 (IAC) where the Upper Tribunal held that in order to demonstrate procedural unfairness it was necessary to show prejudice, and that had not been demonstrated in this case.

20. Ms Khan then called Mr Cole to give evidence. He adopted his statement dated 27 October 2023. Mr Cole was then cross-examined by Ms Arif when he agreed that he had spoken to the judge prior to the arrival of the Presenting Officer in relation to the case because the judge had called the case on because he was concerned that due to the lateness of the Presenting Officer she may not have time to prepare. The judge also asked Mr Cole to raise the legal definition of "foreign criminal" with the Presenting Officer in advance of the hearing so that issue could be dealt with at the outset.
21. In response to my questions, Mr Cole said he did not know whether or not the recording had been turned on but the court clerk was present at that point to the best of his recollection. Mr Cole said that he did not consider that the judge had acted inappropriately. He said he had spoken to the Presenting Officer outside the hearing room and again inside the hearing room before the judge arrived, although this was more chatting about her difficult journey to court. Mr Cole said that she had not explained why the case could not be allocated to another Presenting Officer. He said that she had been with family in Southend the day before and travelled up to Nottingham on the day of the hearing.
22. Mr Cole further stated that on the day of the hearing he had no concerns at all and was frankly surprised to see Ground 3 of the grounds of appeal. He accepted that the judge had intervened on a handful of occasions but he did not consider these interventions inappropriate. When he had intervened briefly to clarify whether statutory social services were involved with the Claimant's children or whether he was referring to the independent social worker who was instructed to prepare a report, the Judge berated him and said that he should have waited for re-examination. As to the second intervention regarding the fact the Claimant's ex-wife's statement was not signed, this was something he had discussed with the

Presenting Officer outside the hearing room and so he was surprised that she had asked the Claimant about this as he could not answer because he had not taken the statement. Mr Cole said there was nothing he could ascertain and he had no inkling that there was any problem at all during the hearing. Mr Cole confirmed that his record of proceedings are his contemporaneous typed notes.

23. I reserved my decision which I now give with my reasons.

Decision and reasons

24. With regard to Ground 1 of the grounds of appeal, I accept the submissions of Ms Khan that this ground is misconceived. The Respondent expressly accepted that the Claimant did not fall within the definition of “foreign criminal” at section 32(1) of the UK Borders Act 2007: [12] and [25] as he is not a persistent offender, his sentence was less than 12 months and was not deemed to cause harm. Therefore, HA (Iraq) [2022] UKSC 22 is inapplicable because in light of that what the judge was required to do was to determine whether interference with the Claimant’s private and family life was necessary and proportionate.
25. With regard to Ground 2, I have concluded that Ms Arif’s submission is not made out. The judge took account of the sentencing remarks dated 25.10.18 at [13]. In light of the material concessions made by the Respondent, the judge found at [25] that section 117(C) of the NIAA 2002 was not engaged as the Claimant did not fall within the definition of “foreign criminal.” I accept that the Judge did not, in these circumstances, then go on to make reference to section 117B NIAA 2002 but I have concluded that this is not ultimately material, given that section 117B(2)-(4) are neutral considerations, the Claimant developed his family life with his two elder children firstly in Turkey and then whilst lawfully present in the United Kingdom and the key provision, section 117B(6) which would otherwise have availed the Claimant given the concession that it would be unduly harsh to expect his children to leave the United Kingdom in order to relocate to Turkey, is expressly excluded from consideration due to the fact that he is facing deportation. The judge did conduct a balancing exercise taking account of the sentencing remarks of the trial judge and the SSHD’s position.
26. The majority of the arguments before the Upper Tribunal focused on ground 3, which concerned assertions by the Presenting Officer that there had been procedural irregularity in the hearing of the Claimant’s appeal. I have given particularly careful consideration to this serious allegation and I have concluded that it is not made out on the particular facts of this case, for the following reasons:

- 26.1. the Presenting Officer, Ms Tasnim neither produced a signed witness statement nor presented herself to the Upper Tribunal in order that her account could be tested in cross-examination by Ms Khan. I am aware that following Awuah and Others (Wasted Costs Orders – HOPOs – Tribunal Powers) [2017] UKFTT 00555 (IAC) at [22] that Home Office Presenting Officers are not officers of the court, belong to none of the regulated professional cohorts and are essentially unregulated, however they are subject to positive obligations of helping the Tribunal further the overriding objective and cooperating with the Tribunal generally [23]. By way of contrast, Mr Cole who had been present as the Claimant’s legal representative at the hearing before the First tier Tribunal, did present himself before the Upper Tribunal and had submitted a signed witness statement and typed record of proceedings. As a solicitor Mr Cole is an officer of the court and is subject to high standards of professional behaviour. In these circumstances where the accounts differ I place more weight on the evidence of Mr Cole;
- 26.2. whilst the substance of the respective records of proceeding is very similar, the difference is in Ms Tasnim’s perception of the interventions by the Judge and the two interventions by Mr Cole. Mr Cole explained and I accept that the judge’s interventions were based on the fact that, having made material concessions that the Claimant had a genuine and subsisting parental relationship with his two elder children, the Presenting Officer then appeared to be asking questions designed to undermine or go behind that concession. In these circumstances the Judge’s interventions were clearly appropriate in order to clarify the Presenting Officer’s position. Similarly in the Presenting Officer’s submissions, the Judge intervened on the same issue as the Presenting Officer had failed to explore the Claimant’s relationship with his two elder children in cross-examination and then sought to make submissions questioning the depth of that relationship, without having challenged his evidence. Again, the Judge was correct to intervene. If the Presenting Officer wished to explore the Claimant’s relationship with his two elder children in order to found a submission that eg it was not a close relationship, in circumstances where she conceded earlier at the hearing that the relationship was genuine and subsisting, then it was incumbent upon her to put questions to the Claimant on the point during cross-examination, given that he was present and gave evidence even if his ex-wife was absent at a cousin’s wedding in Spain. Alternatively, the Presenting Officer could have sought to withdraw her concession. She did neither.
- 26.3. As to Mr Cole’s interventions, one concerned the fact that the Claimant’s ex-wife’s statement was unsigned and he had explained to the Presenting Officer prior to the hearing that this is because it was taken remotely during the pandemic and since he had prepared

the statement and not the Claimant, he would be unable to answer questions about this. The second intervention concerned a point in his evidence where the Claimant appeared to confuse statutory social services with the meeting with an independent social worker instructed to prepare a report on the family dynamics and Mr Cole sought to clarify this to avoid the mistaken impression that the Claimant's two eldest children were involved with statutory Social Services. Mr Cole fairly accepted in his evidence that the Judge did not approve of this intervention and informed him it would have been better to wait for re-examination. This is not recorded by Ms Tasnim in her file minute. I do not consider that these interventions were of an oppressive nature.

- 26.4. In her file minute Ms Tasnim describes the Judge asking how to pronounce her name, then pronouncing it incorrectly anyway and *"seemed quite patronising."* Ms Tasnim asserts that *"overall experience in court was intimidating, due to train tickets and delays I was half an hour late to court, request for CVP was refused by courts on 2 occasions prior to the hearing."* I accept Ms Khan's submission that the reason Ms Tasnim was upset was likely to be less to do with the conduct of the Judge and more to do with the fact that she had to cut short a family visit and undergo a lengthy train journey on the morning of the hearing since the Court service had refused to convert the hearing to cvp and presumably she was unable to persuade a colleague to cover the hearing. Ms Tasnim described feeling deflated, frustrated and anxious during and after the hearing and described the Judge as being *"unnecessarily difficult."* I do not consider that this is borne out by the evidence considered as a whole. Whilst as indicated above, HOPOs are not subject to the same professional standards as legal representatives, hearings are an adversarial process where HOPOs are expected to cooperate and assist the Tribunal and a certain robustness is required. Ms Tasnim was late and then sought to pursue a line of questioning and submissions which undermined her own concession which is both unhelpful and confusing. Whilst it is unfortunate that Ms Tasnim was left feeling unhappy, I consider that none of the interventions by the judge were inappropriate or oppressive in the circumstances considered as a whole.
- 26.5. Perhaps most telling of all is the fact that at no stage during the hearing did Ms Tasnim raise any of her concerns as to procedural fairness with the judge. I consider that, whilst accepting it is difficult, if she felt that she was not being treated fairly that it was incumbent upon her to raise this at the time, rather than after the event.
27. No challenge was made to the decision by the judge that, considering all the relevant circumstances, particularly the Claimant's relationship with his three children, deportation of the Claimant would be disproportionate.

Notice of Decision

28. For the reasons set out above, I find no material errors of law in the decision and reasons of the First tier tribunal Judge, whose decision to allow the claimant's appeal is upheld.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman

17 November 2023