



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

Appeal Numbers: IA/03313/2015
IA/03314/2015
IA/03315/2015
IA/03316/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 19 January 2016**

**Decision & Reasons Promulgated
On 01 March 2016**

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**(1) MRS BIRGUL KAYGUSUZ
(2) MR CENGIZ KAYGUSUZ
(3) [E K]
(4) [H K]**

Respondents

Representation:

For the Appellant: Ms E Savage, Senior Presenting Officer

For the Respondents: Mr C Jacobs, instructed by Ahmed Rahman Carr
Solicitors

DECISION AND REASONS

Introduction

1. The appellant before the Upper Tribunal is the SSHD. The claimants¹ are citizens of Turkey. The first and second claimants are married to each other and the third and fourth claimants are their sons. The third claimant was born in February 2000 in Turkey and the fourth claimant in May 2008 in the UK. No anonymity order has been sought and none is made.
2. The second claimant entered the United Kingdom illegally in 2005 and has remained here unlawfully ever since. The first claimant entered the UK as a visitor in January 2007, with the third claimant, each having leave to enter conferred until 24 July 2007. Both have remained here unlawfully since the expiry of the aforementioned leave. There is now a third child of the family, born in August 2014. This child is not one of the claimants in the instant appeal.
3. On or around 4 March 2014 the claimants applied for leave to remain on the basis of their family and private life in the United Kingdom. These applications were initially refused in a decision dated 19 May 2014. A challenge was brought thereto by way of an application for judicial review, which was subsequently compromised upon the SSHD agreeing to reconsider the claimants' applications and, in the event of a further refusal, to thereafter issue the claimants with a removal decision triggering a right of appeal to the First-tier Tribunal. That process of reconsideration was completed on 2 January 2015, when the applications were once again refused. On the same date decisions were made to remove the claimants from the United Kingdom.
4. The claimants appealed these decisions to the First-tier Tribunal and their appeals were allowed in a decision of First-tier Tribunal Judge Pears promulgated on 27 July 2015. The appeals of the first, second and third claimants were allowed under the Immigration Rules and all of the claimants' appeals were allowed on "*human rights grounds*".
5. The Secretary of State subsequently sought, and obtained, permission to appeal to the Upper Tribunal by way of a decision of First-tier Tribunal Judge Heynes, made in the following terms on 29 October 2015:
 - "2. The grounds complain that the Judge erred in considering whether it would be reasonable for the third appellant to leave the United Kingdom, gave insufficient reasons for allowing the appeals of the first, second and third appellants, placed too much weight on a compatibility statement predating changes to the Immigration Rules, failed to acknowledge that a child's private life established over seven years could be outweighed by other factors and wrongly stated that the first and second appellants could meet the requirements of the parent route when they were precluded by the requirements of E-LTRPT2.3.

¹ To avoid confusion the appellants before the First-tier Tribunal (the Respondents before the Upper Tribunal) are referred to herein as 'the claimants'.

3. The decision of the Judge is careful and thorough but it is arguable that insufficient consideration was given to countervailing factors in determining whether it was reasonable for the appellants to return.”

Legal context

6. It is prudent to set out the legal context within which First-tier Tribunal’s (“FtT’s”) decision sits.
7. The requirements to be met for limited leave to remain as a parent are found in paragraph R-LTRPT of Appendix FM to the Immigration Rules; paragraph 1.1(d) thereof reading:
 - ‘(i) the applicant must not fall for refusal under S-LTR: Suitability Leave to Remain; and
 - (ii) the applicant meets the requirements of paragraphs E-LTRPT2.2-2.4 and E-LTRPT3.1; and
 - (iii) paragraph EX.1 applies.’

E-LTRPT 2.3 requires that:

- ‘(a) the applicant must have sole parental responsibility for the child: or the child normally lives with the applicant and not their other parent (who is a British citizen or settled in the United Kingdom); or
 - (b) the parent or carer with whom the child normally lives must be –
 - (i) a British citizen in the UK or settled in the UK;
 - (ii) not the partner of the applicant ...;
 - (iii) the applicant must not be eligible to apply for leave to remain as a partner under this Appendix.’
8. At the material time, paragraph 276ADE of the Immigration Rules, insofar as is relevant, provided:

‘276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:

 - (i) does not fall for refusal under any of the grounds in Section S-LTR 1.2 to S-LTR 2.3. and S-LTR.3.1. in Appendix FM; and
 - (ii) has made a valid application for leave to remain on the grounds of private life in the UK; and
 - (iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or
 - (iv) is under the age of 18 years and has lived continuously in the UK for at least seven years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or

(v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or

(vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK.'

9. Section 117B of the Nationality, Immigration and Asylum Act 2002 ("2002 Act") is also of significance, and reads:

'(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.'

Discussion

Immigration Rules - Appeals of the First and Second Claimants

10. At the outset of the hearing Mr Jacobs properly conceded that the FtT erred in allowing the appeals of the first and second claimants' on the basis that each met the requirements of the Immigrations Rules.
11. In her decision letter the Secretary of State concluded that the first and second claimants each failed to meet the requirements of both paragraph E-LTRPT 2.2 and paragraph E-LTRPT 2.3 of Appendix FM to the Rules. In its decision the First-tier Tribunal addressed its mind to only the former requirement, failing to engage at all with the requirements of the latter provision.
12. This is significant because there is no dispute that both claimants cannot fulfil the requirements of paragraph E-LTRPT 2.3 and thus cannot satisfy the requirements of paragraph R-LTRPT of Appendix FM to the Rules. The FtT's decision to allow their appeals on the basis that each met the requirements of the Immigration Rules is, consequently, perverse.
13. Despite the aforementioned concession, Mr Jacobs maintained that the FtT's conclusions on Article 8 outwith the Rules cannot be impugned and, accordingly, its decision to allow the claimants' appeals should not be set aside.

Immigration Rules (third Claimant) / Article 8 outwith the Rules (all Claimants)

14. It is to this matter that I now turn, observing that at its core there is the need to analyse the First-tier Tribunal's consideration of whether it is reasonable to expect the third claimant to leave the United Kingdom and return to Turkey - a requirement that is, in the instant case, not only central to the third claimant's claim under the Rules, but also the first and second claimants' claims outwith the Rules (as a consequence of the operation of s.117B(6) of the 2002 Act).
15. The Secretary of State, eloquently represented by Ms Savage at the hearing, seeks to bring challenge to the reasoning and conclusions of the FtT on the aforementioned issue, on the following basis:
 - (i) The First-tier Tribunal erred by failing to take into account relevant 'countervailing' factors;
 - (ii) The First-tier Tribunal attached excessive weight to the Secretary of State's statement of the "Grounds of Compatibility with Article 8", which pre-dates a material amendment to paragraph 276ADE(1)(iv) of the Rules;
 - (iii) The First-tier Tribunal erred in directing itself at [38] that "*there is nothing in the Immigration Rules that states that "the fact that all of a family unit would be returning can trump a child's private life established for 7 years"*";
 - (iv) The First-tier Tribunal's conclusions are inadequately reasoned.
16. The following provides further addition to the framework for the Tribunal's

consideration of the lawfulness of the FtT's decision, and the claimed errors therein:

- (i) When the question posed by s.117B(6) of the 2002 Act is the same as the question posed in relation to children by paragraph 276ADE(1)(iv) of the Rules, it must be posed and answered in the proper context of whether it is reasonable to expect the child to follow its parents to their country of origin;
- (ii) This is not a question that needs to be posed in relation to each child more than once (see AM (s.117B) Malawi [2015] UKUT 0260 (IAC) at [36]);
- (iii) The underlying parliamentary intention is that where the conditions of s.117B(6) are satisfied, the public interests identified in Section 117B(1)-(5) are of no application (see Treebhawon and Others (Section 117B(6) [2015] UKUT 00674 (IAC) at [21]-[22]).

17. At the hearing before the Upper Tribunal Ms Savage accepted that:

- (i) The Secretary of State did not seek to bring a pure rationality challenge to the FtT's conclusion that it would not be reasonable to require the third claimant to leave the UK; and,
- (ii) The FtT's conclusions in relation to the fourth claimant stand or fall with the decision on the appeals of the first and second claimants.

18. I now turn to consider the substance of this appeal i.e. the FtT's treatment of the issue of whether it is reasonable to expect the third claimant to leave the United Kingdom and move to Turkey. The reasoning and conclusions on this issue pervade all other aspects of this appeal, save for the discreet consideration of paragraph E-LTRPT 2.3 of Appendix FM which, as identified above, the FtT ought to have, but did not, consider. It was not suggested that the FtT's error in relation to the application of paragraph R-LTRPT (as identified above) of itself vitiates the FtT's decision on Article 8 outwith the Rules. In any event, I find that it does not - the FtT's consideration of the latter ground clearly being undertaken on the alternative basis that it was wrong in its conclusions under the Rules in relation to the first and second claimants (see paragraph 48 of the FtT's decision).

19. The FtT's finding that it would not be reasonable to require the third claimant to leave the United Kingdom is at the heart of its conclusion that; (a) the third claimant meets the requirements of paragraph 276ADE(1)(iv) of the Rules; and, (b) the first and second claimants' removal would breach Article 8, when considered outwith the confines of the Rules (in large part in consequence of the operation section 117B(6) of the 2002 Act).

20. In her submissions Ms Savage placed focus on the following 'offending paragraphs' in the FtT's decision:

"[14] The appellant's Counsel referred me to the Grounds of Compatibility with Article 8 of the European Convention on Human Rights... (I have highlighted parts) paragraph 27 and 28 says this:

'The Rules deal clearly with how to treat British citizen and other children in cases where we would otherwise intend to remove their parents and how countervailing factors should weigh in the decision. There are some instances where children may be allowed to stay in a permanent or temporary basis on best interests. **The key test for remaining on a permanent basis is around the length of continuous residence of a child in the UK - which we have set at seven years, subject to countervailing factors.** We consider that a period of seven continuous years spent in the UK as a child would generally establish a sufficient level of integration for family and private life to exist such that **removal would normally not be in the best interests of the child** ... the changes are designed to bring consistency and transparency due to decision making.'

While the best interests of the child are a primary consideration, **in some circumstances criminality will be a countervailing factor which outweighs the child's best interests.** The criminality thresholds which will apply are set out below

...

[16] In the most recent Immigration Directorate Instructions on Family Migration this is said at 11.2.4:

'The requirements that a non-British citizen child has lived in the UK for a continuous period of at least the seven years immediately preceding the date of application, recognises **that over time children start to put down roots and integrate into life in the UK, to the extent that being required to leave the UK may be unreasonable ... and strong reasons will be required in order to refuse a case with continuous UK residence of more than seven years.**" [emphasis in original]

And then in the conclusory paragraphs:

"[36]The case would turn on my view of the law and the importance of the children being in the UK for as long as they have been.

...

[38] I conclude that there is nothing in the Immigration Rules that says that the parent route is not intended to be relied on by a person who remains in a genuine and subsisting relationship with the other parent of their child. Further there is nothing in the Immigration Rules that says that the fact that all of a family unit would be returning can trump a child's private life established for a period of seven years.

[39] I apply what is said in paragraph 14 and 16.

[40] I find that the third appellant at the time of the application and the

fourth appellant currently have been in the UK for more than seven years.

- [41] Further I find that the third appellant has put down roots and integrated into life in the UK, to the extent that being required to leave the UK is unreasonable.
- [42] Further I find that the fourth appellant has now put down roots and integrated into life in the UK, to the extent that being required to leave the UK is unreasonable.
- [43] I find that there is no criminality or countervailing factors of sufficient weight to offset what is said in paragraph 41 and 42.
- [44] I find therefore that the third appellant meets the requirements of paragraph 276ADE(iv) as he is under 18 and has lived in the UK for at least seven years at the date of the application and it would be unreasonable to expect him to leave the UK.
- [45] I find that he is a qualifying child and that the first and second appellants meet the requirements of R-LTRPT1.1 of Appendix FM not least because, unlike the respondent, I conclude that EX.1 applies, as it would not be reasonable for [EK] to leave the UK.
- [46] I turn to the fourth appellant and it seems to me that he only fails to meet the requirements of the Rules because he had not been in the UK for seven years at the time of the application. The possibility of the first three appellants remaining and the fourth appellant returning to Turkey means that an arguable basis for the exercise of discretion has been put forward, the relevant factors have not already been assessed and a repeat evaluation is necessary outside the Rules.
- [47] I find that the decision will interfere with the fourth appellant's private and family life and will have consequences of such gravity as potentially to engage Article 8. I accept it is in accordance with the law and may be necessary but it cannot be proportionate where, if the first, second and third appellants remain, the fourth appellant should be required to leave the UK for Turkey, either to remain there or to make an application from Turkey to return.
- [48] I turn to the first and second appellants in the event that my views in their meeting the Immigration Rules are considered incorrect. I find that the decision will interfere with their family life if the third appellant is permitted to remain and it will have consequences of such gravity as potentially to engage Article 8. I accept it is in accordance with the law and may be necessary. I have considered paragraph 117B including (6) and I judge that it cannot be proportionate where the third appellant remains in the UK."

21. Turning to the first of the Secretary of State's grounds, Ms Savage identified the following four 'countervailing factors' that, she asserted, the FtT failed to take account of when finding that it would not be reasonable to expect the third claimant to leave the United Kingdom and move to Turkey:

- (a) The third claimant would be living in the same core family unit in Turkey as has been the case in the UK;

- (b) He has resided at all times in the United Kingdom with his Turkish national parents;
- (c) He has previously resided in Turkey; and,
- (d) He speaks Turkish.

22. As to the second ground Ms Savage observed that in paragraph 39 of its decision the FtT directed itself to apply the guidance given in the statement of the “Grounds of Compatibility” (set out at paragraph 20 above). This, she asserted, was in error given that this statement had been drawn up prior to the change in the Immigration Rules, which introduced an additional limb to paragraph 276ADE(1)(vi) thereof i.e. that a child applicant must demonstrate, in addition to the fact that they have been in the UK for 7 years, that it would not be reasonable for them to leave the UK.
23. In relation to the third ground of challenge, Ms Savage drew attention to the terms of the second sentence of paragraph 38 of the FtT’s decision and commended the Upper Tribunal to conclude that this sentence should be read as the FtT directing itself that the length of a child’s residence in the UK - if over seven years - should be treated as determinative of the issue of whether the requirements of the Immigration Rules had been met.
24. Lastly, Ms Savage asserted that when the FtT’s decision is read as a whole the Secretary of State is not in a position to understand why she was unsuccessful in the appeal - thus the decision discloses an unlawful inadequacy of reasoning.
25. Mr Jacobs did not seek to dispute that the features of the third claimant’s circumstances identified by Ms Savage (in her submissions made in relation to the first ground) are relevant to a consideration under both paragraph 276ADE(iv) of the Rules and s.117B(6) of the 2002 Act. He submitted, however, that when the FtT’s decision is read as a whole it is apparent that such circumstances were properly taken into account. It was further asserted that the FtT’s reference to the “Grounds of Compatibility” was not unlawful, and that it had been well aware of the subsequent change in the Rules - as amply evidenced both by its consideration of the current Immigration Directorate Instructions (paragraph 16 of its decision) and its reference to, and conclusions on, the issue of whether it would be reasonable to expect the third claimant to leave the UK. As to the challenge drawn in relation to the self-direction given in paragraph 38 of the FtT’s decision, Mr Jacobs submitted this to be misconceived.
26. It is clear, in my view, that the FtT was well aware of each of the ‘countervailing’ features of the third claimant’s circumstances referred to by Ms Savage in her submissions. Nowhere in its decision is there a suggestion that the FtT proceeded on the basis that the third claimant had ever lived apart from his parents whilst in the UK and, when identifying in paragraph 25 of its decision that “[They stayed with family and friends”

(my emphasis) the FtT was clearly alluding to the fact that the four claimants had lived together in the UK. Equally, there is no indication in the decision that the FtT advanced its conclusions on the unlawful basis that the third claimant would be returning to Turkey without the other claimants; indeed, the contrary is posited in paragraph 38 thereof. Furthermore, the FtT finds, in paragraphs 25 and 26 of its decision, that the third claimant lived in Turkey prior to coming to the United Kingdom. This fact also readily apparent from reading paragraphs 1, 3 and 5 of the FtT's decision as a whole. That the third claimant can speak Turkish, although cannot write in that language, is observed in paragraph 27 of the FtT's decision.

27. I find there to be no merit in Ms Savage's submission that the fact that certain features of the claimant's circumstances are only mentioned in paragraphs 25 to 32 of its decision, and are not thereafter repeated under the heading "*Observations Findings and Conclusions*" [paragraphs 33 onwards], ought to lead to a finding that the FtT excluded such features from its consideration. At the risk of being repetitive, I remind myself that the FtT's decision must be read as a whole. On a fair reading of its decision it is clear that those findings made in paragraphs 25 to 32 (albeit under the heading "Evidence") were fed into the conclusions identified later therein. It is to the circumstances identified in paragraphs 25 to 32 of its decision that the FtT must have been referring when, in paragraph 41, it stated: "*the Third Appellant has now put down roots and integrated into life in the UK...*"
28. Although not advanced by Ms Savage at the hearing, the pleaded grounds also aver that the FtT erred in failing to take into account the relevant circumstances of the other claimants when determining whether it is reasonable to require the third claimant to leave the UK. Again, I find that this submission is not made out when the FtT's decision is read as a whole.
29. The circumstances of all four claimants are identified in paragraphs 25 to 32 of the FtT's decision. Although clumsily expressed, in my view reading paragraphs 41 and 43 together demonstrates that the FtT understood that it should not consider the third claimant's circumstances in isolation and that paragraph 276ADE(1)(iv) of the Rules (and 117B(6) of the 2002 Act) require an examination of the circumstances of all four family members. Significantly, as alluded to further below, the issue of whether it would not be reasonable to require the third claimant to leave the UK was considered on the basis most favourable to the Secretary of State i.e. on the understanding that the third claimant's parents would leave the UK with him.
30. For these reasons I reject the Secretary of State's contention that the FtT erred in failing to take account of relevant matters when concluding that it would not be reasonable to require the third claimant to leave the UK.
31. I also reject the contention that the FtT attached excessive weight to the

'Grounds of Compatibility". The fact that these were drawn up prior to the amendment to the Immigration Rules on 13 December 2012 is highly unlikely to have escaped the expert judge's attention, and a sensible reading of paragraphs 14 to 16 of the FtT's decision (particularly when read with paragraphs 17 to 22) discloses that the FtT was therein correctly setting out the genesis of the relevant rule, and the rationale underpinning it.

32. Furthermore, the FtT correctly directed itself to the requirements of paragraph 276ADE(1)(iv) of the Rules, identifying that in addition to the need for a child applicant to demonstrate a period of seven years residence, such applicant must also demonstrate that it would not be reasonable to require them to leave the UK. It is of some significance in my mind that as well as quoting from the "Grounds of Compatibility" the FtT also cited, in paragraph 16 of its decision, from the 'current' IDIs - which clearly post-date the change to the immigration rule; indeed, emphasis was placed therein on the aspects of the IDI which reflected such a change.
33. Turning to the third ground, I agree that if the claimed 'offending sentence' in paragraph 38 of the FtT's decision is read in isolation then it is suggestive of the Tribunal having directed itself that residence of the third claimant in the UK for over seven years would be determinative of the third claimant's appeal. However, one only has to read paragraphs 41 to 44 of its decision to identify that this is not how the FtT approached its task. As already recognised above, it is clear that the Tribunal was aware that paragraph 276ADE(1)(iv) of the Rules incorporates a two-step consideration, both steps of which the third claimant had to surmount; the latter being a requirement that it "*would not be reasonable to expect [the third claimant] to leave the United Kingdom.*"
34. As to the final limb of the Secretary of State's case before the Upper Tribunal, in my view although the structure of the FtT's decision does little to assist, when it is read as a whole it is clearly understandable why the Secretary of State was unsuccessful in this appeal.
35. For the reasons given above, I find that the FtT's conclusion that it would not be reasonable to require the third claimant to leave the UK is not infected by material error. Contrary to the Secretary of State's assertions, I find that the FtT properly directed itself in law, took into account all relevant matters, did not take account of irrelevancies and gave lawfully adequate reasons for its conclusions. The Secretary of State does not seek to challenge the FtT's decision on rationality grounds.
36. Consequently, I conclude that the FtT's decision that the third claimant meets the requirements of paragraph 276ADE is not flawed by legal error capable of affecting the outcome of the appeal. As to the decision in relation to the first and second claimants' appeals, there is no error in the conclusion that they each fulfil the requirements of s.117B(6) of the 2002

Act. Following the rationale in Treebhawon [at 18] in such circumstances the Article 8 public interest does not require their removal. If this is wrong, and meeting the requirements of s.117B(6) is not determinative of the issue of whether removal is proportionate in any given case, then the FtT's decision is nevertheless sustainable. First, the terms of paragraph 48 of the FtT's decision convey that it did not treat the requirements of s.117B(6) as determinative of the first and second claimants' appeals and, second, Ms Savage did not seek to identify any features of the first and second claimants' circumstances which, having fulfilled the requirements of s.117B(6) should, nevertheless, have led to an adverse decision.

37. To summarise, my conclusions in the appeal before the Upper Tribunal are as follows.

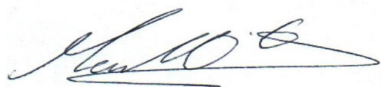
(a) The FtT erred in allowing the first and second claimants' appeals under the Immigration Rules. Nevertheless, I do not exercise my discretion to set aside the FtT's decision because:

- (i) The FtT's conclusion that the third claimant meets the requirements of paragraph 276ADE(1)(iv) of the Immigration Rules is not flawed by legal error and remains standing; and,
- (ii) The FtT's conclusion that removal of the first, second and fourth claimants would breach Article 8 ECHR outwith the confines of the Immigration Rules is not flawed by legal error and remains standing.

Notice of Decision

For the reasons given above, the SSHD's appeal before the Upper Tribunal is dismissed.

Signed:



Upper Tribunal Judge O'Connor
Date: 2 February 2016