Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00028/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 February 2018	**On 7 March 2018**
Ex tempore judgment	

Before

THE HON MR JUSTICE MARTIN SPENCER
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE KOPIECZEK

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ARB
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms A Holmes, Home Office Presenting Officer
For the Respondent: Ms F Shaw, Counsel instructed by London Solicitors LLP

DECISION AND REASONS

1. By permission to appeal granted by Upper Tribunal Judge Gill on 4 January 2018, the Secretary of State for the Home Department appeals against the decision of First-tier Tribunal Judge Beach who allowed the appeal of the respondent, to whom we shall

refer as ARB, against the decision of the Secretary of State dated 9 February 2017 to deport him to Turkey which is the country of his citizenship. The grounds of appeal are set out in the permission application for permission to appeal dated 13 November 2017 and we will consider those in more detail later.

The Background to this Decision

2. ARB was born in Turkey on [ ] 1966 and he entered the UK on 8 January 1989 at the age of 22 as an asylum seeker. On 2 October 1989 the Home Office wrote to ARB to inform him that he had been recognised as a refugee in the United Kingdom under the United Nations Convention relating to the Status of Refugees of 28 July 1951 and its protocol of 1967. He was granted leave to remain in the UK until 2 October 1993. On 11 January 1995 ARB was granted indefinite leave to remain. On 21 February 1999 ARB married 'G' in Istanbul and they have lived in London throughout their married lives. They have two children, both born in London, 'H' born on [ ] 2001 and 'B' born on [ ] 2002 who are both British citizens. In the course of his residence in the UK ARB has made three applications for naturalisation but these have all been unsuccessful.

3. On 29 August 2014 ARB was convicted at Snaresbrook Crown Court of four counts of controlling or possessing fake goods for the purposes of sale or hire for which he was sentenced to a term of imprisonment of seventeen months. It is that conviction which has led the Secretary of State to notify ARB of the decision to deport him. The circumstances of the conviction and sentence arise from the sentencing remarks of the judge. ARB owned or rented various units on an industrial estate and from those units he ran a company called Read and Blue London Trading Limited. This company was a wholesaler, buying lorry-loads of goods and selling them on to other people. In July 2013 Her Majesty's Customs and Excise detected a lorry load of goods which appeared to be 8 kilo boxes of Ariel washing powder but which in fact were counterfeit and had originated from somewhere in eastern Europe. This followed on from a previous detection of a lorry load of fake Persil washing powder in April 2013. The amount realised from this fraudulent activity was impossible to ascertain because of the lack of documentation but a sum of about £40,000 in cash was found at ARB's premises. In sentencing ARB the judge said, "This was a piece of thorough dishonesty on your part made worse by the fact that you continued with your contentions about the honesty of this operation before the jury", this being a reference to the fact that ARB had pleaded not guilty to two of the counts on the indictment but had been convicted by a jury. Even before the First-tier Tribunal, ARB continued to minimise his role, stating that he did not know that the goods were fake, an assertion which was inconsistent with the verdicts of the jury.

4. On 16 December 2014 ARB was served with a decision to make a deportation order against him in accordance with Section 32(5) of the UK Borders Act 2007 subject to consideration of Section 33 of the same Act. On 9 February 2017 it was decided to refuse ARB's protection and human rights claims made on 16 December 2014 and 29 May 2015 and maintain the decision to deport him as it was not accepted that he fell within any of the exceptions set out in Section 33 of the 2007 Act.

5. Representations made by London Solicitors in their letter of 29 May 2015 on ARB's behalf refer to both children being British nationals and students at grades 8 and 9 respectively at that time. The letter said:

> "They are well-settled in the United Kingdom and their main tongue is English as they hardly speak any Turkish. They have spent their entire lives in the United Kingdom and they cannot be expected to relocate in Turkey or elsewhere apart from the United Kingdom. Their schools and friends are all in the United Kingdom. Their children have been in Turkey only for holiday purposes and when they were there they always stayed in a hotel. His daughter [H] has been taking gym courses and she came first at a competition whereas his son has been attending drama courses…His wife [G] has been currently working as a taxi driver for about ten months. She is also well-settled together with the children. At the moment he [ARB] looks after their children while his wife is the breadwinner."

6. In addition to the representations of 29 May 2015 the Secretary of State also received a letter from the United Nations High Commissioner for Refugees which drew attention to the difficulties which ARB might face if he returned to Turkey by virtue of his Kurdish ethnicity. The UNHCR also made representations in relation to the provisions of Article 33(2) of the 1951 Convention.

7. By her decision of 9 February 2017 the Secretary of State decided as follows:

   (i) Subsequent to obtaining refugee status, ARB could no longer, because of the circumstances in connection with which he had been recognised as a refugee had ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality leading to revocation of the grant of refugee status;

   (ii) ARB did not qualify for humanitarian protection but because of his conviction, sentence had been excluded from a grant of humanitarian protection pursuant to paragraph 339D(iii) of the Immigration Rules.

   (iii) ARB was not entitled to discretionary leave to remain because on the information available it was not considered that to deport him would breach the UK's obligations under any of the Articles of the European Convention on Human Rights.

   (iv) ARB's circumstances including the best interests of his children did not lead to a decision that deportation would breach the UK's obligations under Article 8 ECHR because "the public interest in deporting you outweighs your right to private and family life".

8. Of particular relevance for present purposes is the decision of the Secretary of State in relation to the children. The decision stated:

> "Consideration has been given below to the effect deporting you will have on your children and whether the best interests of your children outweigh the public interest in deporting you. The requirements of the exception to

deportation on the basis of family life with a child are set out at paragraph 399(a) of the Immigration Rules. This exception applies where:

(a) the foreign criminal has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British citizen; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported.

The decision continues:

"On the basis of the submitted evidence it is accepted that you have a genuine and subsisting parental relationship with H and B. It is not accepted that it would be unduly harsh for H and B to live in Turkey. Although your children are British citizens, they are also of Turkish descent by virtue of the fact that both you and their mother are of Turkish origin. They would have been raised within an environment where they would have been aware of the language and the customs of Turkey. They are young enough at 16 and 14 years of age, to adapt to living in Turkey with the support of their parents if that is what you and their mother decide. It is accepted that any move to another country will cause a degree of disruption to a child's life but it is considered that many people around the world reasonably and legitimately take their children to live in another country either temporarily or permanently even though this may cause a certain amount of disruption.

It is not accepted it will be unduly harsh for H and B to remain in the UK even though you are to be deported. This is because you have failed to provide any evidence to show that there would be a significant detrimental effect upon them if you were deported. Furthermore, you have not provided any evidence to show that your presence in the UK is essential to prevent them from being ill-treated, their health or development being impaired. It is acknowledged that your absence will likely result in some negative emotional impact on your children but they will continue to live with their mother who will care for them as they adapt to life without face-to-face contact with you and will continue to attend school where they will have the stability and support which is necessary to complete their education. There is no evidence that their welfare has been compromised whilst in the care of their mother. Besides, your children will not lose all contact with you as this can be maintained by visits and modern forms of communication.

> Therefore, having considered all available information, it is not accepted that you meet the requirements of the exception to deportation on the basis of family life with a child."

9. ARB appealed against this decision and the appeal was heard by First-tier Tribunal Judge Beach on 26 September 2017. Having set out the background, the evidence which she had heard and the submissions from Counsel from both sides, Judge Beach at paragraphs 51 and following set out the relevant law. Having cited the relevant Immigration Rules, parts of the Nationality, Immigration and Asylum Act 2002 she referred to the relevant authorities. She reminded herself of the decision in **McLarty [2014] UKUT 00315** where it was stated that in enacting the UK Borders Act 2007:

> "Parliament views the object of deporting those with a criminal record as a very strong policy, which is constant in all cases…Parliament has tilted the scales strongly in favour of deportation and for them to return to the level and then swing in favour of a criminal opposing deportation there must be compelling reasons, which must be exceptional."

10. Furthermore, she reminded herself that in **MM (Uganda) [2016] EWCA Civ 617** the Court of Appeal stated, "The context in these cases invites emphasis on two factors, (1) the public interest in the removal of foreign criminals and (2) the need for a proportionate assessment of any interference with Article 8 rights". The Court referred to Section 117C(2) of the 2002 Act which states, "The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal".

11. Finally, Judge Beach reminded herself of the principles of law which were restated in the Court of Appeal in **AJ (Zimbabwe) [2016] EWCA Civ 1012**. At paragraph 60 of her judgment Judge Beach set out the principles of law which are well-established and not in dispute in these appeals as follows:

> "(1) The Rules establish a set of criteria which tribunals must apply when assessing the impact of Article 8 in criminal deportation cases.
>
> (2) The rules are a complete code. Accordingly, when applying the 'exceptional circumstances criteria' the court should apply the article 8 proportionality test, referring to **MF (Nigeria)**.
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> (3) Unless the specific exceptions apply, the scales are very heavily weighted in favour of deportation. In **MF (Nigeria)** Lord Dyson said that there must be 'very compelling reasons' to outweigh the public interest in deportation. These compelling reasons constitute the 'exceptional circumstances' referred to in rule 398.
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> (4) The justification for the courts giving such weight to the public interest in the deportation of foreign criminals is not simply that the Immigration Rules do so, it is that Parliament itself in section 32(5) of the UK Borders Act has stipulated that deportation should be the usual consequence of criminal offending: see **SS (Nigeria)**, para 54, where Lord Justice Laws said that 'only a very strong claim indeed' could override the public interest.

(5) A consequence of the rules constituting a comprehensive code is that when exercising the residual article 8 assessment where exceptional circumstances are relied upon, the tribunal must carry out the assessment 'through the lens of the new rules' and that requires a recognition of very considerable weight to be given to the public interest in deportation. This distinguishes the foreign criminal cases from other article 8 cases, such as where the Secretary of State seeks to remove illegal immigrants in circumstances engaging article 8, where no single factor carries such dominant weight and a more general balancing exercise will be appropriate.

(6) When having regard to the public interest in deportation, there are three important facets: the need to deter foreign criminals from committing serious crimes; an expression of society's revulsion at serious crimes and building public confidence in the treatment of foreign criminals who have committed such crimes; and the risk of re-offending. It is an error to assume that the risk of re-offending is the sole, or even the most important, facet where serious crimes are committed, referring to the observations of Lord Justice Wilson (as he then was) in **OH (Serbia)**.

(7) It is not enough for a tribunal in its reasons simply to identify a strong public interest in the deportation of foreign criminals; there must be a full recognition of the very powerful weight to be given to that factor and of the need for compelling factors to outweigh it: referring to **Secretary of State for the Home Department v MA (Somalia) [2015] EWCA Civ 38** at para 25 per Lord Justice Richards.

12. In relation to the role of Appellate Tribunals Judge Beach referred to **Heshan Ali (Iraq) v SSHD [2016] UKSC 60** where it was stated:

> "It is the duty of appellate tribunals, as independent judicial bodies, to make their own assessment of the proportionality of deportation in any particular case on the basis of their own findings as to the facts and their understanding of the relevant law. But, where the Secretary of State has adopted a policy based on a general assessment of proportionality, as in the present case, they should attach considerable weight to that assessment: in particular, that a custodial sentence of four years or more represents such a serious level of offending that the public interest in the offender's deportation almost always outweighs countervailing considerations of private or family life; that great weight should generally be given to the public interest in the deportation of a foreign offender who has received a custodial sentence of more than 12 months; and that, where the circumstances do not fall within rules 399 or 399A, the public interest in the deportation of such offenders can generally be outweighed only by countervailing factors which are very compelling."

13. Judge Beach then proceeded to allow ARB's appeal only in respect of one of the matters relied on, namely the effect deportation would have on the two children. He observed that if they had to leave the UK to be with ARB they would lose the benefits of their citizenship with an impact on them in terms of access to free health care and a significant change in education systems. She found that their education would suffer as a result of this when both were at crucial stages of their education. Taking account of all the circumstances including the fact that they would lose regular

contact with their peer groups and extended family who live in the UK and given the societal discrimination against Alevi Kurds in Turkey, they would be faced with a real risk of being exposed to discrimination.

14. The next question for the judge was whether it would be unduly harsh for the children to remain in the UK. Judge Beach observed that the evidence had established that they were a close family who would do all they could to assist each other. She then stated as follows at paragraph 95:

> "95. They are at particularly crucial stages of their development and as teenagers require the steady support of both parents or they run the risk of making the wrong decisions in the future which will impact not only on them and their wider family but also on society as a whole. There was no suggestion that the appellant was not a steady and positive influence in their lives and this was the thrust of the evidence from all the witnesses.
>
> 96. The public interest lies very strongly in deporting foreign national criminals and it will only be if the appellant fulfils the requirements of section 117C that deportation would not be appropriate. I give significant weight to the public interest in this case. Equally the circumstances of the appellant and his children must also be considered. I accept that the separation of parent and child can be an inevitable consequence of a foreign national offending but I also have regard to the very real effect that this would have on the appellant's children. This effect goes beyond being merely uncomfortable and inconvenient and I find that there will be a real and adverse emotional effect on the children's development if the appellant is deported from the UK. For these reasons, I find that the effect on the children of remaining in the UK without the appellant would be unduly harsh.
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> 98. Taking account of all the evidence and all of the circumstances cumulatively, I find that it is unduly harsh to expect the children to leave the UK with the appellant or to remain in the UK without the appellant and that there are therefore exceptional compelling circumstances in this particular appellant's case which mean that the public interest is outweighed and that the respondent has not shown that the decision is a necessary, justified or proportionate decision."

15. The Secretary of State has appealed against that decision on the basis that there were material errors in law. First, it is contended that whilst the judge made reference to ARB's criminal conviction as being part of the assessment of what is unduly harsh, in describing the nature of that counter element she failed to note the additional relevant aspect that ARB had denied two elements of the charges against him and continued to deny responsibility at the hearing. It is contended that this was plainly relevant to the underlying question of risk of re-offending and the weight to be ascribed to the already formidable public interest and the judge was obliged to make a finding on this herself. However, in our judgment, this was adequately and properly dealt with by the judge in the decision to which we have referred. She quoted fully at paragraph 81 of the judgment the Crown Court judge's sentencing remarks and again at paragraph 82 and he acknowledged that those sentencing remarks did raise concerning issues. She said at paragraph 85:

> "In general, I would not normally find that an offence meant that an appellant was not culturally or socially integrated in the UK otherwise no appellant subject to deportation could even fulfil the criteria of that exception. However, in the particular circumstances of this appellant I do have some concerns about his social integration into the UK given that the judge noted in his sentencing remarks that there was evidence which strongly suggested that there was a 'front' company, that transactions were not properly noted for the purposes of accountability and that money was being siphoned out of the UK. These are all issues that raise some concern about the level of the appellant's integration into the UK."

16. Furthermore, she was concerned at the failure of ARB fully to acknowledge his guilt and ARB's continuing assertion before her when giving evidence that he did not have the necessary criminal *mens rea* in relation to the offences for which he had been convicted. In our view the judge took full account of those factors in carrying out the weighing exercise that she did when she reached her decision and it is not reasonably arguable that she failed to do so given the prominence which she attached to the conviction - not surprisingly given that the conviction was the reason for deportation and the circumstances of it and the reaction of ARB to his conviction.

17. Next it is asserted on behalf of the Secretary of State that the judge's formulation of the public interest in this case was unlawful by reason of her failure to have express regard to its manifold nature in respect of its deterrent threat as set out in the case of **AM [2012] EWCA Civ 1634** at paragraph 24 where it was stated:

> "Deportation in pursuit of the legitimate aim of preventing crime and disorder is not, therefore, to be seen as one-dimensional in its effect. It has the effect not only of removing the risk of re-offending by the deportee himself, but also of deterring other foreign nationals in a similar position. Furthermore, deportation of foreign criminals preserves public confidence in a system of control whose loss would itself tend towards crime and disorder."

18. However, as has been pointed out by Ms Shaw who has represented ARB before us, the judge made full reference to the later decision of **AJ (Zimbabwe)** to which we have referred earlier in this judgment and the principles there set out incorporate all the principles which had been set out in **AM** and indeed go further and we do not accept that a failure to refer to **AM** itself betrays any error of law on the part of the judge when he has referred to **AJ (Zimbabwe)** and the principles to be applied.

19. Third, it is suggested that the factors listed by the judge at paragraph 93 as justifying his finding that leaving the UK would be unduly harsh do not individually or cumulatively meet the required level of harshness. We have no doubt that the factors referred to by the judge do meet that level in relation to the issue of the children leaving the UK and that the factors relied upon by the judge were more than adequate to justify her finding that re-settling them would be unduly harsh.

20. Fourth, it is suggested that the findings in respect of the children's Alevi Kurdish identity was manifestly unlawful as this was not a view directly expressed by the children and was therefore "utter speculation", to quote from the grounds of appeal,

and it is said that there was no evidence whereby the judge could conclude that discrimination against Alevis was so pervasive that it would have any material effect on the children, in practice. This is really subsumed within the third ground but in any event Ms Shaw has referred us to country guidance from 2017 which firms up the country guidance from the previous year and suggests that discrimination against Alevis is now more than merely a possibility but happens in fact.

21. Finally, it is submitted that the analysis of the judge at paragraph 95 of the decision in relation to the requirements of Rule 399(a) and (b) amounted to a material dilution of the legal test in that the judge was in reality equating the test to one of reasonableness. We have found this the most difficult of the issues which have been raised in this case and we have considered with some concern whether the factors relied upon by Judge Beach, at paragraph 95 in fact go beyond the test which was set out by the Court of Appeal in the case of **AJ (Zimbabwe)** in relation to what is always a consequence of deportation where children are left behind.

22. In the course of the hearing Judge Kopieczek raised with Ms Shaw the statement in the judgment of Lord Justice Elias in that case at paragraph 13 where he said:

> "This court has on a number of occasions had cause to emphasise that the mere fact that there will be a detrimental effect on the best interests of the children where the parent (almost always the father) is deported in circumstances where the children cannot follow him does not by itself constitute an exceptional circumstance"

And further, at paragraph 17:

> "These cases show that it will be rare for the best interests of the children to outweigh the strong public interest in deporting foreign criminals. Something more than a lengthy separation from a parent is required, even though such separation is detrimental to the child's best interests. That is commonplace and not a compelling circumstance. Neither is it looking at the concept of exceptional circumstances through the lens of the Immigration Rules. It would undermine the specific exceptions in the Rules if the interests of the children in maintaining a close and immediate relationship with the deported parent were as a matter of course to trump the strong public interest in deportation. Rule 399(a) identifies the particular circumstances where it is accepted that the interests of the child will outweigh the public interest in deportation. The conditions are onerous and will only rarely arise. They include the requirement that it would not be reasonable for the child to leave the UK and that no other family member is able to look after the child in the UK. In many, if not most, cases where this exception is potentially engaged there will be the normal relationship of love and affection between parent and child and it is virtually always in the best interests of the child for that relationship to continue. If that were enough to render deportation a disproportionate interference with family life, it would drain the rule of any practical significance. It would mean that deportation would constitute a disproportionate interference with private life in the ordinary run of cases where children are adversely affected and the carefully framed conditions in rule 399(a) would be largely otiose. In order to establish a very compelling justification overriding the high public interest in deportation, there must be some additional

feature or features affecting the nature or quality of the relationship which take the case out of the ordinary. "

23. It is in that context that the various factors relied upon by Judge Beach at paragraph 95 are important. The factors which she quoted were as follows:

> "The children are at crucial stages in their lives and education. One is in his GCSE years and the other is in her first year of A levels. The appellant's daughter is a talented gymnast by all accounts. The appellant's daughter has described in her witness statement her emotional distress at being separated from the appellant when he was in prison and has spoken of her real worry at being separated from him again and the emotional impact this would have on her. She has also spoken of the adverse effect on her day to day life and her ability to concentrate on her education whilst the appellant was in prison and her stress at the current uncertainty regarding the appellant. Whilst she is growing into an adult, a father figure will also play a significant role in her life and in her development in happy and healthy relationships in the future. The relationship between a father and son is perhaps even more important at the age of the appellant's son who is currently 15 years old. The appellant's son also talks of his strong relationship with the appellant in his witness statement. He also speaks of the emotional distress which he faced when the appellant was in prison and the effect on him if the appellant were deported from the UK. The separation of a parent and child is known to have a real emotional impact on a child who can then struggle to form healthy relationships in the future. There has already been a demonstration of the emotional impact on the children described in their witness statements. Whilst the appellant's children are of an age when they can better understand the reason why the appellant is not in the UK it should not be forgotten that they are still teenagers and will struggle to fully understand the reasons for the separation. Being teenagers also has an impact on their emotional needs. They are at particularly crucial stages of their development and as teenagers require the steady support of both parents or they run the risk of making the wrong decisions in the future which will impact not only on them and their wider family but also on society as whole."

24. Although, as we have said, we have had some concern as to whether the factors relied upon by the First-tier Tribunal Judge could be said in law to amount to fulfilling the test of undue harshness beyond the effect which all deportations of foreign criminals will necessarily have where that means separation from their children, in the end we have taken the view that Judge Beach correctly directed herself in law, she had full regard to the legal principles as set out fully in her careful judgment, she did undertake a proper weighing process which would have included the weighing up of the fact that in the calendar of offences this cannot by any means be said to be the most serious of criminality and decided that, having weighed those matters, the public interest in deportation was on this occasion outweighed by the compelling circumstances raised by the interests of the children. In those circumstances in our view there was no material error of law and we would dismiss the Secretary of State's appeal.

Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. Accordingly, the Secretary of State's appeal is dismissed, and the decision of the First-tier Tribunal to allow the appeal therefore stands.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the respondent is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 27 February 2018

Mr Justice Martin Spencer