



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

Appeal Number: IA/32930/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 14 July 2015**

**Determination Promulgated
On 15 July 2015**

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

Aziz Kocak

[No anonymity direction made]

Claimant

Representation:

For the claimant: Ms S Haji, instructed by SH & Co Solicitors

For the respondent: Mr T Wilding, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The claimant, Aziz Kocak, date of birth 20.9.85, is a citizen of Turkey.
2. This is the appeal of the Secretary of State against the determination of First-tier Tribunal Judge Bartlett promulgated 27.2.15, allowing the claimant's appeal against the decision of the Secretary of State to refuse his application made on 3.7.14 for leave to remain in the UK on the basis of family life. The Judge heard the appeal on 23.2.15.
3. First-tier Tribunal Judge Cruthers granted permission to appeal on 28.4.15.

4. Thus the matter came before me on 14.7.15 as an appeal in the Upper Tribunal.

Error of Law

5. For the reasons set out below I find there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Bartlett should be set aside and remitted to the First-tier Tribunal to be remade afresh. In summary, I find that the judge misunderstood the Immigration Rules and confused the guidance or policy in relation to exemption from the 'no public funds' stipulation applicable to certain applications under the Immigration Rules with the clear financial requirements set out in Appendix FM.
6. The claimant is married to a British citizen. His application for leave to remain claimed that he was exempt from the meeting financial requirements of Appendix FM, set out at E-LTRP 3.1, because as a Turkish citizen he is eligible for certain public funds. However, his application was based on a fundamental misunderstanding of the Rules, the same erroneous approach pursued by Ms. Haji in her submissions to me and propounded to and accepted by the First-tier Tribunal before Judge Bartlett.
7. The application was refused because, amongst other reasons, he failed to demonstrate that he met the minimum income threshold, or alternatively the requirements of E-LTRP 3.3, which requires him to provide specified evidence with his application that his partner was in receipt of one or more of the eight specific state benefits set out in E-LTRP 3.3, and to provide evidence that the partner is able to maintain and accommodate themselves adequately without recourse to public funds. The appellant's contention that he was exempt from the financial requirements was considered in the refusal decision, but the Secretary of State pointed out that he had failed to state in his application which, if any, public funds his partner is in receipt of that would constitute an exemption from the minimum income threshold financial requirement. At section 7.6 of the application form, in reply to the question asking whether he was receiving any public funds, he ticked the no box. No evidence was provided that either he or his partner was in receipt of any public funds. The application form clearly explains that relevant evidence must be submitted with the application. Appendix FM-SE D explains that unless the absent evidence falls within one of the evidential flexibility provisions there set out, such as a document in the wrong format, the Secretary of State will not consider documents not submitted with the application.
8. In summary, an must either: (1) show that he meets the minimum income threshold; or (2) that his partner is in receipt of one of the 8 listed benefits and they can maintain themselves with recourse to public funds; or (3) that EX1(b) applies and the applicant can demonstrate that his is a genuine and subsisting relationship with his partner with settled status in the UK (in this case a British citizen), and that there are insurmountable

obstacles, defined by EX2 as very significant difficulties which could not be overcome or which would entail very serious hardship, to family life with that partner continuing outside the UK.

9. The policy or guidance referred to, part of which is set out in the claimant's bundle relates to the issue of access to public funds and the prohibition of 'no recourse to public funds' that is a feature of several immigration routes for entry or leave to remain, such as paragraph 281 of the Immigration Rules. This guidance explains that certain citizens of certain countries may rely on certain state benefits without breaching the 'no recourse to public funds' requirement. It is in effect an exemption from that particular requirement, but only in relation to certain specified public funds. Put another way, where maintenance is an issue in an application under the Rules the Secretary of State may not refuse the application because it would involve reliance on certain public funds, i.e. the listed state benefits, which are different, dependent on the citizenship of the applicant. It does not, and does not purport to, exempt citizens of the listed states from the financial requirements for leave to remain on the basis of family life under Appendix FM of the Immigration Rules. In short, the policy or guidance document relied on has nothing to do with the financial requirements of Appendix FM. This misunderstanding lies at the heart of the application, the submissions on the claimant's behalf and the decision of the First-tier Tribunal.
10. The guidance or policy does, however, have a relevance to section E-LTRP 3.3(b) and the requirement to demonstrate ability of a couple to maintain themselves "without recourse to public funds," but is only relevant and can only apply after evidence has first been provided that the partner is in receipt of one of the 8 state benefits listed in E-LTRP 3.3(a), which evidence the claimant did not provide. Even now, there remains no evidence that the partner is in receipt of one of the 8 state benefits. Ms Haji pointed to A13 to show that she was in receipt of statutory sick pay, but that is not one of the listed benefits. The claimant is not in receipt of any state benefits and much of the material in his bundle amounts to a complaint against the DWP that he has been refused benefits because he does not have a biometric document. That issue is irrelevant to the application made to and considered by the Secretary of State.
11. It follows that the policy of which Ms Haji made great play does not assist the claimant's application or appeal.
12. From A105 the claimant's bundle includes a number of unreported decisions, in respect of which no application has been made to cite. They are similar to each other, but not directly relevant to the claimant's application and situation. They deal with the 'no recourse to public funds' requirement under paragraph 281 of the Immigration Rules. They provide no assistance to the claimant's case. Neither does the evidence of tax credits at A23 of the bundle.
13. I reject as misconceived, muddled and wrong in law, Ms Haji's submission

that because the claimant is entitled as a citizen of Turkey to rely on certain public funds the financial requirements of Appendix FM do not apply to him.

14. It follows that the claimant failed to demonstrate that he met the requirements of either E-LTRP 3.1 or 3.3. Ms Haji accepted that the claimant did not meet the minimum income threshold requirement. However, there remains the third alternative of EX1, as explained above. That matter was considered by the Secretary of State and set out in the refusal decision, but the First-tier Tribunal Judge has not addressed it, but should have. Neither did the judge address the question of leave to remain outside the Rules on the basis of private or family life pursuant to article 8 ECHR. It follows that the decision was made in clear error of law and cannot stand.
15. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or that it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. Where there have been no findings on a crucial issue at the heart of an appeal, as in this case, effectively there has not been a valid decision. The errors of the First-tier Tribunal Judge means that there was no consideration of EX1 or, alternatively, article 8 ECHR outside the Rules.
16. In all the circumstances, at the invitation and request of both parties to relist this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that this is a case falling squarely within the Senior President's Practice Statement at paragraph 7.2. The effect of the error has been to deprive the parties of a fair hearing and that the nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

Conclusions:

17. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I remit the appeal to the First-tier Tribunal to be made afresh.



Signed

Deputy Upper Tribunal Judge Pickup

Dated

Consequential Directions

18. The appeal is remitted to Hatton Cross, to be listed at the first available date;
19. There will be two witnesses and the time estimate is 2 hours;
20. It may be heard by any judge other than First-tier Tribunal Judge Bartlett;
21. Not later than 7 days before the First-tier Tribunal appeal hearing listing date the claimant's representatives shall submit a single, revised, indexed and paginated bundle of all materials on which the claimant intends to rely;

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award Note: this is not part of the determination.

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The outcome of the appeal remains to be decided.

A handwritten signature in black ink, appearing to be 'J. M. Pickup', written in a cursive style.

Signed

Deputy Upper Tribunal Judge Pickup

Dated