



**Upper Tribunal  
(Immigration and Asylum Chamber)**  
HU/09350/2015

Appeal Number:

**THE IMMIGRATION ACTS**

**Heard at: Field House**

**Decision and Reasons  
Promulgated**

**On: 24 October 2017**

**On: 06 November 2017**

**Before**

**MR C M G OCKELTON, VICE PRESIDENT  
UPPER TRIBUNAL JUDGE PLIMMER**

**Between**

**MEMET KURT  
(Anonymity Direction Not Made)**

Appellant

**and**

**ENTRY CLEARANCE OFFICER**

Respondent

**Representation**

**For the Appellant:** Mr A Burrett, Counsel

**For the Respondent:** Mr L Tarlow, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant appeals against the decision of First-tier Tribunal Judge Swaniker promulgated on 12 May 2017, in which his appeal against the Respondent's decision to refuse to issue him entry clearance under the family reunion rules, to join his spouse in the United Kingdom ('UK'), was dismissed on human rights grounds.

## Background facts

2. The Appellant is a citizen of Turkey. His spouse ('the Sponsor') and their two children were granted leave to remain in the UK as refugees in September 2013. This followed a successful appeal before First-tier Tribunal Judge Walker. Judge Walker's decision was promulgated on 10 January 2012. He accepted the credibility of the Sponsor's account, and made the following findings at [34]:
  - (i) The Sponsor and her family came from a Kurdish area with links to the PKK;
  - (ii) The Sponsor and this Appellant are both Kurds who provided food and shelter to the PKK;
  - (iii) They were both arrested and then convicted on 24 March 2011, of aiding and abetting the PKK;
  - (iv) They were both sentenced to over six years imprisonment but lodged appeals;
  - (v) The Appellant remained in custody from the time of the arrest but the Sponsor was released on bail during the criminal proceedings and pending appeal, but left Turkey in 2011, with her children before the criminal appeal was determined;
  - (vi) If returned to Turkey the Sponsor faces a real risk of persecution.
3. The Appellant claims to have been released from prison in 2014 and made the application for entry clearance to join his wife and children in the UK in an application submitted online on 24 June 2015. The Respondent refused to grant him entry clearance on the basis that he had been convicted of an offence in relation to which he was given a custodial sentence of at least four years, and his exclusion is conducive to the public good for the purposes of para 320(19) of the Immigration Rules, and there would be no breach of Article 8 of the European Convention on Human Rights ('ECHR'). This decision was maintained by the entry clearance manager, and in grounds dated 20 October 2015 the Appellant appealed to the First-tier Tribunal.
4. The bundle before Judge Swaniker contained an 'updated' witness statement from the Sponsor. This repeated much of the information already summarised above in Judge Walker's decision, save that instead of relying upon the initial claim that she fled Turkey whilst on bail, pending appeal, the statement says this (our emphasis):

"In 2010, I and my husband faced accusations which lead to criminal charges for aiding and abetting the PKK. My husband was sentenced to 6 years and 3 months however I was cleared and fled Turkey with my two sons arriving in the UK in July 2011."

### **First-tier Tribunal hearing**

5. The Sponsor's evidence before Judge Swaniker is summarised at [7] to [8] of the decision. The Sponsor gave oral evidence through a Turkish interpreter. She confirmed that she remembered saying what was contained in her witness statement, it was translated to her and she was happy to rely upon it.
6. Judge Swaniker summarised the evidence provided by the Sponsor, as translated by the interpreter in the following manner. The Sponsor was referred to her witness statement and asked the date that she was "*cleared*". She gave an answer that tended to indicate her name was cleared in 2011 and she then came to the UK, but was then asked what she meant by her name being cleared. The response to this is difficult to follow. The Judge then asked the Sponsor to clarify what happened to her case in Turkey, given that she had said she was cleared. She then said there was an appeal to a higher court and she came to the UK before that concluded.
7. After this, Judge Swaniker records the interpreter as having "*advised that there may be a problem with the Turkish word 'tem' which meant 'clean', but when spelt/expressed with a 'y' could also mean 'appeal'*". There is nothing to indicate that the judge took any steps to ensure that the Sponsor and the interpreter fully understood one another, after the interpreter identified this 'problem'. The sponsor then repeated her claim that before her appeal was concluded she came to the UK.

### **First-tier Tribunal findings**

8. Judge Swaniker concluded that the sponsor's overall credibility was tainted and undermined by her inconsistent accounts of her circumstances in Turkey before coming to the UK and her evasiveness regarding the outcome of the case against her [14]. In particular, Judge Swaniker was concerned that the evidence in the witness statement and the initial oral evidence was to the effect that the Sponsor's name had been cleared, yet her evidence before Judge Walker was that she left Turkey when she was on bail, pending an appeal.
9. Judge Swaniker indicated that he was grateful for the interpreter's assistance as to the different meanings of the word 'tem' at [15], however noted, inter alia, that the sponsor confirmed at the onset of her oral testimony that she remembered everything in her witness statement. Judge Swaniker made a finding of fact that the sponsor was cleared of the charges against her and that her discrepant evidence regarding this, tainted her overall reliability as a witness.

10. As set out at [17] onwards, it is against that background that Judge Swaniker considered and dismissed the appeal on Article 8 grounds.

### **Grounds of appeal**

11. In grounds settled by Counsel, the appellant submitted: first, that Judge Swaniker erred in law in failing to treat Judge Walker's decision as the starting point in accordance with Devaseelan v SSHD [2003] Imm AR 1; and second, there was a failure to address the interpreter's intervention that there was a 'problem' with the English translation of an important part of the Sponsor's evidence. The First-tier Tribunal granted permission on both grounds.

### **Hearing**

12. At the beginning of the hearing, Mr Tarlow agreed with the provisional view we expressed regarding the second ground of appeal. He acknowledged that the error goes to the 'heart of the determination' and that notwithstanding what is said within the rule 24 notice, the matter should be remitted to the First-tier Tribunal.
13. Mr Tarlow was entirely correct to make this concession for the reasons we set out below. Given this concession, we do not need to address the first ground of appeal and can set out our reasoning for allowing the appeal on the second ground, succinctly.

### **Discussion**

14. Judge Swaniker made a finding that the Sponsor's evidence contained discrepancies without clearly identifying or understanding the evidence she actually provided. Having noted the interpreter's 'advice' that there may be a 'problem' with the translation of a particular Turkish word and that it might mean 'clean' or 'appeal', the judge was obliged to clarify with the Sponsor and the interpreter, whether any, and if so which, aspects of the Sponsor's evidence may have been misunderstood or interpreted inaccurately. Where, as here, evidence is provided through an interpreter who has acknowledged a degree of confusion and misunderstanding going to a pivotal potential discrepancy, that evidence cannot properly support or act as a foundation stone for any viable material discrepancy.
15. We note that the witness statement itself states that the Sponsor 'was cleared'. However, the accuracy of that translation is called into question by the interpreter's indication that 'clear' might be confused with 'appeal'. Indeed, the Sponsor only confirmed that her statement, as translated to her, was true. Contrary to the observations of Judge Swaniker at [15] it is possible to interchange: "however, I was cleared

and fled Turkey”; with “however, I appealed and fled Turkey”.

16. We are satisfied that the interpreter’s intervention raised an important point and the First-tier Tribunal was obliged to address it by specifically exploring the extent to which it tainted the reliability of the translation of the evidence provided by the Sponsor. Absent this, there has been, as accepted by Mr Tarlow on behalf of the Respondent, procedural unfairness.

## **Disposal**

17. For these reasons, we find that the First-tier Tribunal's decision discloses errors of law capable of affecting the outcome of the appeal, and we set it aside.
18. Both representatives agreed that the decision should be remade by the First-tier Tribunal. We have had regard to para 7.2 of the relevant *Senior President’s Practice Statement*, the fundamental nature of the error identified, and the nature and extent of the factual findings required in remaking the decision, and conclude that it is necessary for this appeal to be remitted to the First-tier Tribunal to be determined afresh by a judge other than Judge Swaniker.

## **Decision**

19. The decision of the First-tier Tribunal involved the making of an error of law. Its decision cannot stand and is set aside.
20. The appeal shall be remade by First-tier Tribunal .

Signed: Ms Melanie Plimmer  
2017  
Judge of the Upper Tribunal

Dated: 6 November