



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

Appeal Number: IA/33290/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 21 September 2018**

**Decision & Reasons
Promulgated
On 9 January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**HUSEYIN [D]
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr N Bramble, Senior Presenting Officer

For the Respondent: Miss V Nassar, Counsel

DECISION AND REASONS

1. In this decision the Appellant is referred to as the Secretary of State and the Respondent is referred to as the Claimant.
2. The Claimant a national of Turkey applied on 20 August 2014 for an EEA residence card as a non-EEA national who was a family member which was refused on 24 November 2014. His appeal against that decision came

before First-tier Tribunal Judge Herbert (the Judge) who on 21 November 2016 allowed the appeal but was somewhat unspecific upon which basis he did so.

3. On 24 May 2018 this matter came before Deputy Upper Tribunal Judge Chapman who concluded that there was an error of law and that the matter should be remade. It is clear that the Judge's principal error proceeded from an error in his understanding of the basis of the Secretary of State's decision and failing to address the significance of Section 117B(6) of the NIAA 2002 as amended, not least in the context of the best interests of the two children of the family who are British nationals now aged 14 and 12 years respectively. The Judge simply did not address the issue of whether it was reasonable to expect the children as British nationals to leave the United Kingdom where they had resided from birth with their mother who had indefinite leave to remain.
4. The Judge simply failed to address the significance of the potential removal. It was accepted on the information that was before the Judge he correctly recited evidence as to the fact that the children were in schooling, they were settled, they were moving forward with their lives in the UK and they were of course British citizens. In considering this matter it is also fair to note that one of the issues which the Judge did correctly resolve was that the Claimant's conviction in Germany was in 1994 rather than 2004, as had mistakenly been stated, and upon which the Secretary of State had founded much of the decision through no fault of her own.
5. The Claimant's conviction was in 1994 and irrespective of the guidance as to the age of such convictions or to what extent they could be relied upon, the fact was that he did not disclose the conviction when he made an application on 16 September 2008. It may be the non-disclosure was the fault of others, an agent or the person helping with the application. It matters not. The non-disclosure was his and the fact was that was a material consideration. I consider this matter in the context of the case

law of MA (Pakistan) [2016] EWCA Civ 60 and AM (Pakistan) [2017] EWCA Civ 11.

6. It is clear that MA (Pakistan) has been considered by the Supreme Court in KO (Nigeria) [2018] UKSC 53. The considerations of the relationship between 117B(6) NIAA 2002 and the general proportionality exercise; as well as whether or not there are powerful reasons Section 117B(6) should not be applied. I apply the law as it is today and I do so with reference to the above cases. I therefore conclude that the evidence that was before me and before the Judge was not sufficient to show in the light of the conviction and its age that there were powerful reasons to override in terms of the Claimant's immigration history or such conduct override the general premise that UK nationals should not be required to leave the United Kingdom unless it is reasonable and proportionate to do so.
7. In this case Mr Bramble can say no more than with reference to the conviction. I conclude having weighed all the evidence particularly in relation to the children's education and their lives in the UK. I reached the conclusion that it is not reasonable for them to leave under Section 117B(6) NIAA 2002; the public interest does not require the Claimant's removal.
8. In those circumstances it therefore seemed to me in the light of the case law that it was disproportionate and that is as much as needs to be discussed in this case of the proportionality exercise bearing in mind there is no issue that the Appellant's family and private life in the UK engaged Article 8 ECHR. The effect of the Secretary of State's decision was a significant interference that the Secretary of State's decision was lawful and properly served in terms of maintaining proper and secure immigration control. I concluded on the evidence that was present and in the light of the provisions of Section 117B(6) that the public interest does not require removal and that the interference is disproportionate.

9. In reaching that conclusion I took into account also as required by Section 117A and 117B the public interest question and I note for these purposes that the Claimant speaks English, he is financially independent, he is a worker, he has not been a burden upon the taxpayer other than his past criminality in 1994, had no other history of criminality in the UK and presented no threat to UK citizens.

10. For all these reasons I conclude that the Respondent's decision was disproportionate.

DECISION

11. The appeal is allowed under Article 8 ECHR grounds.

ANONYMITY

No anonymity direction was made, none has been requested and therefore no anonymity despite the ages of the children who are not identified in this decision and no anonymity direction is required.

Signed
Deputy Upper Tribunal Judge Davey

Date 13 December 2018

TO THE RESPONDENT **FEE AWARD**

The appeal has succeeded but on the strength of information that arose after the Respondent's decision, in particular addressing the Article 8 ECHR issues. I do not find a fee award, assuming a fee has been paid is appropriate.

Signed
Deputy Upper Tribunal Judge Davey

Date 13 December 2018

P.S. Promulgation of this decision has been delayed by the case file being miss-located