Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/02255/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 17 July 2014	**On 25 July 2014**

Before

THE HON MR JUSTICE LEWIS
UPPER TRIBUNAL JUDGE MOULDEN

Between

MR CUMA CELEN
(No Anonymity Direction Made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Collins of counsel instructed by Stanley Goldman Solicitors
For the Respondent: Mr P Duffy a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Turkey who was born on 3 April 1977. He has been given permission to appeal the determination of First-Tier Tribunal Judge Nightingale and Mr M J Griffiths JP DL ("the First-Tier Tribunal") who dismissed his appeal against the respondent's decision of 18 October 2013 to make a deportation order against him under Section 3(5)(a) of the Immigration Act 1971 on the grounds that the respondent deemed his deportation to be conducive to the public good. On 25 January 2001 the appellant had been

convicted in the Aksaray Criminal Court in Turkey of one count of kidnapping, one count of assault and one count of battery. He had been sentenced to two years and six months imprisonment.

2. The appellant appealed and the First-Tier Tribunal heard his appeal on 21 March 2014. Both parties were represented and the appellant gave evidence. The First-Tier Tribunal found him to be a credible witness and accepted that he was not aware that he had been convicted in Turkey in his absence until he visited the Turkish Embassy in this country to renew his passport. He had not intended to mislead the respondent when he filled in the application form for naturalisation. However, he had been convicted of criminal offences in Turkey in 2001. Subsequently, he was extradited to Turkey and served a term of imprisonment which was less than the original sentence of 2½ years. The First-Tier Tribunal observed that there was a lack of documentation to provide information about the offences.

3. The First-Tier Tribunal found that the appellant had no criminal convictions in this country and had been of good character during the 12 years he had lived her. During that period he had worked and sent money to support his family in Turkey. His wife and children had always lived there.

4. The First-Tier Tribunal considered the provisions of paragraphs 363, 397, 398, 399 and 399A of the Immigration Rules. The appellant pursued the appeal on Article 8 human rights grounds only, both within and outside the Immigration Rules. The First-Tier Tribunal found that the appellant could not bring himself within any of the Article 8 provisions in the Immigration Rules before going on to consider the Article 8 grounds outside the Immigration Rules and in particular whether there were exceptional circumstances in line with SS (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 550, Nasim and others (Article 8) Pakistan [2014] UKUT 25 (IAC) and in particular the guidance of the Court of Appeal in MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192.

5. The First-Tier Tribunal found that there had been delay in processing the appellant's asylum claim and that he had formed a limited private life in this country. He had not absconded from the jurisdiction of the Turkish courts and had not attempted to deceive the immigration authorities in this country. He had been of good character whilst living here and did not pose any threat to the security of the UK. His private life amounted to living here in order to take employment and send money home to his wife and children in Turkey. They were living in the family home in Turkey. His private life was not such as to engage questions of moral physical integrity. Although he had claimed otherwise the appellant would be able to find some sort of employment in Turkey. There might be some initial difficulty in reintegrating but in the past he had been employed in Turkey. The family might be better off with the money he could send from the UK rather than his employment in Turkey. The First-Tier Tribunal concluded that, whilst the appellant's situation was unusual, the circumstances were not exceptional in the MF sense. It was

concluded that the respondent's decision was in accordance with the law and the First-Tier Tribunal dismissed the appeal.

6. The appellant applied for permission to appeal. The application was out of time but the Designated Immigration Judge considered and accepted the explanation and extended time before granting permission to appeal. The grounds submit that the First-Tier Tribunal erred in law in two ways. Firstly, by failing to consider whether the offence for which the appellant was convicted in his absence was sufficient to form the basis for making a deportation order. Secondly, by incorrectly applying an "exceptionality" test.

7. The appellant's representatives have submitted a new bundle running to 109 pages much of which is new material not before the First-Tier Tribunal. Mr Collins accepted that this new material was not relevant to the question of whether the First-Tier Tribunal erred in law and only fell be considered if we concluded that there was an error of law and set aside the decision.

8. In relation to the first ground of appeal Mr Collins accepted that the respondent did not err in making the deportation order. This was an appropriate concession. The basis for making the deportation order was not challenged at the hearing before the First-Tier Tribunal where the appellant relied on Article 8 grounds only. The respondent was entitled to conclude that deportation was in the public interest given that the appellant had committed a criminal offence abroad and served a custodial sentence in respect of that offence. The passage at paragraph 15.29 of Macdonald's Immigration Law and Practice to which the grounds refer states; "the commission of offences abroad might be a ground for a public good deportation, so long as it is not disguised extradition and does not breach the persons human rights". Mr Collins could not find any authority which provided further guidance. This is a case where the appellant was convicted of serious offences in Turkey and the conviction was reviewed by a higher court in Turkey. There is no question of the deportation order being a disguised extradition because extradition has already taken place, the appellant has served his sentence in Turkey and returned to the UK. The First-Tier Tribunal went on to consider whether there was a breach of the appellant's human rights.

9. In paragraphs 43 to 46 of MF the Master of the Rolls said;

> "43. The word "exceptional" is often used to denote a departure from a general rule. The general rule in the present context is that, in the case of a foreign prisoner to whom paras 399 and 399A do not apply, very compelling reasons will be required to outweigh the public interest in deportation. These compelling reasons are the "exceptional circumstances".
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> 44. We would, therefore, hold that the new rules are a complete code and that the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence. We accordingly respectfully do not agree with the UT that the decision-maker is

not "mandated or directed" to take all the relevant article 8 criteria into account (para 38).

45. Even if we were wrong about that, it would be necessary to apply a proportionality test outside the new rules as was done by the UT. Either way, the result should be the same. In these circumstances, it is a sterile question whether this is required by the new rules or it is a requirement of the general law. What matters is that it is required to be carried out if paras 399 or 399A do not apply.

46. There has been debate as to whether there is a one stage or two stage test. If the claimant succeeds on an application of the new rules at the first hurdle ie he shows that para 399 or 399A applies, then it can be said that he has succeeded on a one stage test. But if he does not, it is necessary to consider whether there are circumstances which are sufficiently compelling (and therefore exceptional) to outweigh the public interest in deportation. That is an exercise which is separate from a consideration of whether para 399 or 399A applies. It is the second part of a two stage approach which, for the reasons we have given, is required by the new rules. The UT concluded (para 41) that it is required because the new rules do not fully reflect Strasbourg jurisprudence. But either way, it is necessary to carry out a two stage process."

10. We find that the First-Tier Tribunal did not apply an erroneous test which was limited to "exceptional", "exceptional circumstances" or "exceptionality". In paragraph 30 the First-Tier Tribunal said; "Of course, we use the term "exceptional circumstances" in the manner illuminated by the Court of Appeal in MF". In the final assessment and the conclusions in paragraph 32 both references to "exceptional" were "in the MF sense" and "the circumstances considered in MF". As this is a case where the appellant could not benefit from the Article 8 provisions of the Immigration Rules the First-Tier Tribunal applied the correct test by going on to consider whether there were circumstances sufficiently compelling (and therefore exceptional) to outweigh the public interest in deportation. Mr Collins submitted that the First-Tier Tribunal should have exercised real caution. We find that this was done. All the relevant facts were properly considered in the context of the Article 8 analysis.

11. The First-Tier Tribunal did not make an anonymity direction. We have not been asked to make such a direction and can see no good reason to do so.

12. We find that the First-Tier Tribunal did not err in law and we uphold the determination.

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Signed Date 19 July 2014

Upper Tribunal Judge Moulden