Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/08909/2014

THE IMMIGRATION ACTS

Heard at Stoke on Trent	**Determination Promulgated**
On 24 October 2014	**On 10 November 2014**

Before

Deputy Upper Tribunal Judge Pickup

Between

Hazret Kose
[No anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the appellant: Ms S Shaikh, instructed by SH & Co Solicitors
For the respondent: Ms C Johnstone, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Hazret Kose, date of birth 20.6.87, is a citizen of Turkey.

2. This is his appeal against the determination of First-tier Tribunal Judge Graham, who dismissed his appeal against the decision of the respondent, dated 20.1.14 to refuse his application under the Turkey-European Community Association Agreement 1973 (the Agreement) and to remove him from the UK by way of directions under section

47 of the Immigration Asylum and Nationality Act 2006. The Judge heard the appeal on 25.4.14.

3. First-tier Tribunal Judge Page refused permission to appeal on 6.6.14, but when renewed to the Upper Tribunal, permission was granted on 29.7.14

4. Thus the matter came before me on 24.10.14 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Graham should be set aside.

The Agreement

6. In granting permission to appeal the Upper Tribunal Judge (who did not provide a name, only a squiggle) stated that there was little to criticise in relation to the Agreement but as article 8 was raised as a ground of appeal and in the light of the pending removal, it should have been dealt with by the First-tier Tribunal Judge.

7. It appears to me that the grant of permission is limited to article 8 ECHR only. However, I permitted Ms Shaikh to address me on the Agreement issues.

8. I find that the judge properly considered the correct approach to paragraph 21 of the 1972 Immigration Rules, following the guidance in Akinci (paragraph 21 UC 510 – correct approach) [2012] UKUT 266, and in particular that the appellant's part in the business must not amount to disguised employment.

9. The judge did not rely on the Secretary of State's concerns about a UK driving licence or the lack of a vehicle. Neither did the judge consider it necessary for the appellant to demonstrate understanding of business software.

10. However, between §12 and §14 the judge analysed the appellant's business plan and his evidence. The judge pointed out that at the rate he proposed and the number of deliveries he would have to make a day, working 6-7 hours, the gross return of £40 a day was less than the minimum wage. Once the overheads were taken into account the judge was not satisfied that the income would be sufficient to support him in the UK.

11. The judge also found the working arrangements not credible, the appellant being unable to explain how, if he only worked for each business customer one day a week, they would arrange for food delivery on the other days when he was not working. At §14 the judge said, "..it made no sense for a takeaway to employ the appellant at this rate when they could employ someone and pay the same employee roughly the same rate to work every day of the week." Hence, the judge arrived at the conclusion in §15 that the business plan was in fact disguised employment. In the preceding

paragraphs as well as in §15 the judge indicated what he had taken into account and his reasons for reaching that conclusion.

12. Whilst I accept that there is no requirement in paragraph 21 to demonstrate that an applicant must earn above minimum wage, the considerations made by the First-tier Tribunal in relation to this issue are certainly highly relevant as to whether this is genuine business or in fact disguised employment. It is submitted that the business plan shows a net profit of £1,048 per month. That may be so, but the judge is entitled to place reliance on the appellant's oral evidence as to how the business would work and how he would be remunerated. It is also submitted that as the appellant is single, lives with his parents, and has no major living expenses, his business will be sufficient to support him. Again, the judge is entitled to consider the evidence as a whole, which the judge indicated he had done before reaching his findings and conclusions.

13. The Rule 24 response is to the effect that the Secretary of State considers that the Judge has properly dealt with the issue of the appellant's employment and the findings are clearly sustainable on the evidence. I agree. The grounds of appeal on this issue amount to no more than a disagreement with the judge's findings and conclusions there from, which the judge was entitled to reach and for which cogent reasons have been given. The judge reached the conclusion that the business plan was in fact disguised employment. The appellant had proposed in a rather non-credible way a business providing a takeaway delivery service for customers at £1.50 a time, regardless of distance or time of delivery. I agree with Judge Page that it would have been surprising if the judge had reached any other conclusion given the evidence relied on by the appellant.

14. It is not incumbent on the First-tier Tribunal Judge to recite or summarise all the evidence. He has stated that he has taken it into account and there is, in my view, nothing to suggest that had he made specified reference to the alleged omitted evidence the outcome of this aspect of the appeal would be any different.

15. In the circumstances, and for the reasons stated, I find no error or no material error of law in the judge's findings in relation to the appellant's business plan and the Agreement.

Article 8

16. In relation to article 8 when granting permission to appeal the Upper Tribunal Judge stated, "… the grounds of appeal on this topic are confined to one paragraph. Indeed the skeleton argument makes but a passing reference to this aspect. There is a paucity of evidence on the aspect of private or family life despite the invitation made under the one stop warning notice in the decision of 19.12.13 to submit all evidence that was relied upon. It was said in the grounds of appeal submitted that there would be elaboration with documentary evidence before the appeal hearing. In the event, there was a paucity of evidence submitted.

17. "With some reluctance I grant permission because it is arguable that had the Judge in fact considered the evidence there was little to go on and thus his error was not material. The burden rests upon the appellant and his representatives to adduce all relevant evidence to deal with the issues under Article 8 and paragraph 276ADE. Whether such evidence should be regarded as post decision evidence will also be an issue to be addressed at the hearing."

18. In respect of article 8, the Rule 24 response stated, "… the Secretary of State notes that there is no indication in the determination that this was pursued before the Judge and she would draw the attention of the Tribunal to the comments of Lord Justice Moore-Bick in Para 20 of Sarkar v Secretary of State for the Home Department [2014] EWCA Civ 195:

> "Finally, I think it is important to bear in mind that this court will allow an appeal against a decision of the Upper Tribunal only if it is satisfied that it involved a material error of law. The most that can be said of the decision in the present case is that the Tribunal failed to consider the merits of the appellants' article 8 claim. However, there was no evidence before the Tribunal capable of support the findings of fact necessary to enable their argument to succeed. I find it difficult to see, therefore, how it can be said that any such error was material since, if the Tribunal had considered that ground of appeal, it would have been bound to reject it."

19. The grounds of appeal to the First-tier Tribunal in the present appeal stated only that the appellant had his immediate family members who are all settled in the UK. "It is submitted that our client should be allowed to remain in the UK under the current immigration Rules and also Article 8. It is submitted that the above points will be elaborated with documentary evidence before our client's appeal hearing." Apparently there was no such elaboration by documentary evidence.

20. The grounds of application for permission to appeal contend that the judge failed to make any findings in relation to an article 8 claim to remain in the UK on the basis of article 8 ECHR and paragraph 276ADE, despite being raised in the grounds of appeal to the First-tier Tribunal and in the skeleton argument. The grounds, both to the First-tier Tribunal and to the Upper Tribunal, did no more than raise the issue and made no substantive submissions. The issue appears only at §16 of the skeleton argument, at the very end. There it is suggested that the appellant meets the requirements of paragraph 276ADE, but given that he has not lived in the UK for a period of 20 years it is difficult to see how he could demonstrate that he has no ties, including social, cultural and family with Turkey. He had only lived in the UK for 2 years and 8 months at the date of his application in August 2013. He lives with his parents, who are settled in the UK and his brother is a British citizen. It was submitted that all his immediate family members live in the UK, but I note that in his application at Q7.12 he stated that he had siblings living in Turkey. In any event, the fact that other family members have indefinite leave to remain is not a qualification of entitlement to this appellant being able to reside in the UK indefinitely.

21. In the circumstances, on the limited evidence available, I cannot see how the appellant qualifies under paragraph 276ADE of the Immigration Rules. Thus there can be no error of law in failing to address that provision in the determination.

22. Although it is briefly raised at the very end of the skeleton argument, I have seen no evidence that article 8 was addressed at all by the appellant's representative at the First-tier Tribunal appeal hearing. Before me, Ms Shaikh seeks to rely on alleged emotional dependency between the appellant and his family members in the UK, including his parents with whom he lives. As far as I can tell this is an issue raised for the first time before the Upper Tribunal and not raised at the First-tier Tribunal appeal hearing. I also note that the appellant's witness statement makes no reference to any such emotional dependency, neither does that of his father. In fact the appellant's witness statement raises no article 8 private or family life issue at all. Having considered the whole of the appellant's bundle there is nothing in there at all that in any way addresses article 8 private and family life. It is clear that the appeal before the First-tier Tribunal was placed entirely on the basis of the Agreement and his business plan.

23. In the circumstances, I find that the Secretary of State is correct to point to Sarkar. Whilst the issue of article 8 was raised in the briefest of vague terms, there was no evidence placed before the First-tier Tribunal capable of supporting any finding that there was any family life between the appellant and his parents or any adult family members other than the normal emotional ties that one would expect between such adult relatives. There is no evidence of any emotional or other significant dependency such as to support an argument that article 8 is engaged. I find that the appellant's representative is now, at this late stage, trying to create such an argument, not previously advanced and trying to take tactical advantage of the fact that the First-tier Tribunal did not address article 8 in the determination.

24. Having heard and carefully considered all the evidence and the submissions of the parties, I am satisfied that even if it had been expressly considered, it is undoubtedly the case that any article 8 claim of the appellant could not have succeeded. If it had been raised, which I do not accept it was, the Tribunal would have been bound to reject the claim and additionally dismiss the appeal on article 8 private and family life grounds. He came here as a student with limited leave to remain until 28.8.13. He had no legitimate expectation of being able to remain except in accordance with the Immigration Rules. No evidence has been provided as to whether he actually undertook any studies in the UK. Even now, there is absolutely nothing upon which to found a claim that the removal decision could be regarded as unjustifiably harsh or disproportionate.

Conclusion & Decision

25. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal remains dismissed.

Signed:  Date: 31 October 2014

Deputy Upper Tribunal Judge Pickup

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 appeal has been dismissed and thus there can be no fee award.

Signed:  Date: 31 October 2014

Deputy Upper Tribunal Judge Pickup