IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/03691/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 December 2014	**On 13 January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A C O
(ANONYMITY ORDER CONTINUED)

Respondent

Representation:
For the Appellant: Mr T Melvin, (Senior Home Office Presenting Officer)
For the Respondent: Ms S Bassiri-Defouli (Counsel)

DECISION AND REASONS

1. The Secretary of State has permission to appeal against a decision in ACO’s favour but it will be convenient to refer to the parties as they were before the First-tier Tribunal. The appellant is a citizen of Turkey. His appeal against a decision to remove him from the United Kingdom was allowed by First-tier Tribunal Judge Randall (“the judge”) in a determination promulgated on 6 November 2014. The appellant contended that he was at real risk on return to Turkey, the country of his nationality. The judge found that he was not at any risk and dismissed the

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appeal on asylum, humanitarian protection and human rights grounds. He allowed the appeal, however, on the basis that the appellant met the requirements of the European Community Association Agreement with Turkey and could benefit from the provisions of the Immigration Rules in HC 510.

2. In the application for permission to appeal, the Secretary of State contended, first, that the judge had given insufficient reasons for his decision to allow the appeal. In the light of his findings that the level of business activity was not established and that the appellant's credibility was damaged, it was incumbent upon the judge to provide cogent reasons as to why he accepted on a balance of probabilities that a business plan had been provided previously, that no significant investment was required in terms of equipment, that such equipment was available to the appellant, that his liabilities were affordable and that third party support was sufficient. The author of the grounds contended that no reasons were given for those favourable findings. It appeared that the judge had allowed the appeal on the basis of only two points: evidence of business activity and support from family members (at paragraph 58 of the determination).

3. Secondly, it was contended that the judge's finding that the Secretary of State had found that the appellant had been running a business was misconceived. In refusing the application for leave made in January 2013, the Secretary of State had found that work undertaken by the appellant was outside the terms of his visa and did not constitute a genuine business for the purposes of HC510. Further, no reasons were given for the finding that discretion under paragraph 4 fell to be exercised in favour of the appellant. The appellant's previous deception, attempts to mislead the Home Office and the Tribunal, the late and false asylum claim, the period of overstaying and working in breach of conditions all fell to be taken into account in the light of IY [2008] UKAIT 00081.

4. Permission to appeal was granted on 24 November 2014, the judge granting permission finding that it was arguable that the determination contained inconsistencies in approach.

5. There was no rule 24 response. Ms Bassiri-Defouli said that she had been instructed that there was a cross-appeal. A thorough search of the court file revealed nothing in this regard and there was nothing to show that any such application had been made. I said to the representatives that in those circumstances I would not take any action in regard to the cross-appeal said to have been brought and that the hearing would be confined to considering whether the decision of the First-tier Tribunal contained an error of law, as argued by the Secretary of State. There was no application for an adjournment and the error of law hearing proceeded.

Submissions on error of law

6. Mr Melvin said that reliance was placed upon the grounds, which spoke for themselves. Looking at all the evidence, including the overstaying, the fate of the judicial review and the other points, the judge had given insufficient reasons for allowing the appeal on the basis that the appellant runs a computing business. In the first ground, it was contended that in the light of the adverse factors identified by the judge, insufficient reasons were then given for finding in the appellant's favour. In the second ground, the judge erred in failing to properly take into account the Secretary of State's adverse decision, which was that the appellant had worked in breach of the conditions attached to his visa, rather than a finding that he was not running a business. The fact of his previous deception was considered in great detail in the letter giving reasons for the removal decision. The appellant's first application in 2010 included deception. The asylum claim was not a genuine one and there was also a two year period of overstaying, between the end of the judicial review and the next application for leave. The guidance given in IY was relevant here. The judge ought to have taken it into account. There were material errors in the decision. Looking at things in the round, the overall conclusion reached by the judge that the ECAA requirements were met might be described as close to irrational.

7. Ms Bassiri-Defouli said that the Asylum and Immigration Tribunal was clear in IY that adverse factors including fraud "may" lead to the benefits of the Ankara Agreement being denied. There was no mandatory requirement. The determination was very long and showed that the judge had put questions to the Presenting Officer, on precisely the matters now raised by Mr Melvin. The judge noted carefully all the points made by the Secretary of State in her refusal letter, as he did the evidence of the witnesses and the submissions. He looked closely at the letters relating to the 2010 application. He made some clear adverse findings, including attaching little weight to the documents produced by the appellant at the hearing. He properly went on to find that he had to consider, nonetheless, whether the requirements of HC 510 were met. He carefully highlighted the documentary evidence and assessed which findings could properly be made. He turned to the case against the appellant at paragraph 54 and, again, this showed that he had the Secretary of State's case in mind. The judge was entitled to conclude that the appellant had been running a business. He returned to the deceptive activities at paragraph 56. The Secretary of State was wrong to say that deception was not considered, as an adverse factor. The judge found that if the appellant were relying on his own resources, he would be in difficulties but he could turn to his relatives, and was able to rely on third party support.

8. Sufficient reasons were given for the judge's findings. His assessment was brought together in paragraph 58 and he was entitled to conclude that the requirements of paragraph 21 of HC 510 were met. There was no material error of law. Overstaying was not a basis for refusal in itself but could be taken into account and the judge had indeed done so in his assessment. He analysed the invoices which were before the Tribunal and also had

before him HMRC documents in the supplementary bundle, as was clear from paragraph 8 of the determination.

Conclusion on error of law

9. As Ms Bassiri-Defouli said in her submissions, the determination is a long one. It is extremely thorough and has been prepared by a very experienced judge. Most of the decision concerns the ECAA aspect of the case. The judge gave cogent reasons for dismissing the asylum claim and there was no challenge before me to those findings.

10. As Mr Melvin said, the Secretary of State's letter containing reasons for the removal decision was detailed, including in relation to the ECAA application made by the appellant in March 2010. The Secretary of State also identified as adverse factors the period of overstaying before the appellant sought to make further efforts to regularise his stay, the failed judicial review applications and the meritless (in her view) asylum claim. The Secretary of State then properly considered paragraphs 4 and 21 of HC 510, forming a view on the merits of that application, taking into account supporting evidence made available by the appellant's solicitors in the spring and early summer of 2014.

11. It is clear that the judge had all of these features of the case clearly in mind. There is a very detailed summary of the letter giving reasons for the removal decision and, having read it closely, I find that it is an accurate summary. The Secretary of State's emphasis on factors including deception in the 2010 application and the period of overstaying are set out in the introductory paragraphs. The judge's summary of the documentary evidence before him is also detailed and thorough and it has not been suggested that any salient feature has been overlooked. The appellant's supplementary bundle included more recent evidence regarding his business activities, including a letter from HMRC and invoices, the most recent dating from July 2014.

12. The judge's full engagement with the evidence and the issues is also shown in his summary of the evidence-in-chief and cross-examination of the witnesses. Paragraphs 18 and 19, by way of example, show that the judge properly sought to clarify the evidence regarding the computer business relied upon by the appellant, as he did the invoices relied upon as showing business activities. As Ms Bassiri-Defouli pointed out, the judge also sought to clarify the submissions made by the respondent and, at paragraph 33, he gave the Presenting Officer an opportunity to explain that the "standstill clause" does not prevent Member States from penalising abuse relating to immigration, within the framework of national law. The Presenting Officer was able to emphasise that dishonesty was an important aspect of the Secretary of State's case.

13. The judge’s assessment begins at paragraph 45. He first considers the appellant’s credibility, with an appropriate focus on the ECAA application, introduced into the proceedings by way of notice under section 120 of the 2002 Act. Here, the judge gave detailed consideration to deception at the time of the 2010 application and refusal and he made a series of adverse findings in paragraph 49 of the determination which were properly open to him. He concluded (at paragraph 50) that little weight should be attached to some of the documents produced at the hearing, or to the appellant’s explanations regarding the references provided. He properly went on to direct himself that HC 510 required an assessment of the application on its merits. He had some concerns over the evidence of the appellant’s current business activities and regarding the bank statements provided. He took into account adverse findings made in the High Court in the 2013 application for judicial review. Having weighed the evidence, and having taken into account the adverse factors as well as those supporting the appellant’s case, he concluded that a business plan was made available to the Secretary of State at an earlier date and that the computer repair business the appellant had established required no significant investment in terms of equipment. He found in the appellant’s favour that third party support from relatives, within the scope of the rules, was available. He took into account and carefully assessed the Secretary of State’s findings against the appellant, regarding the business account and the extent of the funds available to meet the appellant’s liabilities. Contrary to the assertion in the grounds in support of the application for permission to appeal, I find that there was no misconception in paragraph 56 of the determination. All the judge had in mind there was that the Secretary of State’s own enquiries revealed evidence of business activity. The judge was clear that the adverse point made by the Secretary of State was that the business was being run without any permission or authority. His finding that the deception related to embellishing genuine business activity rather than seeking to show business activity when none, in truth, existed was open to him. His mention of an “intra rules discretion” referred to his assessment of the position under paragraph 4 of HC 510 and, again contrary to what appears in the grounds, the judge gave reasons for his conclusion that paragraph 4, properly applied, should not lead to refusal of the application.

14. The threads of the analysis are brought together in paragraph 58 of the determination and the summary which appears there is concise and shows the reasons why, on balance, the judge concluded that the requirements of paragraph 21 of HC 510 were met. Again, the author of the grounds contends that no reasons have been given for the judge’s findings but a careful reading of the determination shows that this is simply not so. The determination shows a painstaking, step-by-step assessment of the cases advanced by both parties and the decision contains fully-reasoned findings of fact and conclusions.

15. In summary, I conclude, notwithstanding Mr Melvin’s careful submissions, that no material error of law has been shown in the decision. The judge

had in mind and took fully into account the Secretary of State's case against the appellant and the adverse factors identified by her. Having weighed the evidence overall, the judge was entitled to conclude as he did.

DECISION

16. The decision of the First-tier Tribunal contains no material error of law and shall stand.

17. The First-tier Tribunal Judge made an anonymity direction and I maintain it. No report of these proceedings shall directly or indirectly identify the appellant or any member of his family. This direction applies both to the appellant and to the respondent and failure to comply with it might lead to contempt of court proceedings.

Signed Date **13 January 2015**

Deputy Judge of the Upper Tribunal R C Campbell