Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/20243/2013

THE IMMIGRATION ACTS

Heard at Field House
On 21 July 2015

Decision & Reasons Promulgated
On 3 August 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF
DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

OMER SACAK
(Anonymity Order Not Made)

Appellant

and

ENTRY CLEARANCE OFFICER - ISTANBUL

Respondent

Representation:
For the Appellant: Mr B. Ali, Solicitor Advocate instructed by Stoke & White LLP
For the Respondent: Mr N. Bramble, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The appellant is a citizen of Turkey, born on 26 November 1973, who applied for entry clearance to the United Kingdom to establish a hair dressing business under the Turkey-European Community Association Agreement.

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2. In a decision dated 10 October 2013, the respondent refused the application. The refusal notice stipulated that the appellant could only appeal on human rights grounds. The appellant nonetheless appealed on the basis that the respondent's decision was not in accordance with the Immigration Rules, as well as being incompatible with his rights under the European Convention on Human Rights.

3. The appeal came before First-tier Tribunal Judge M P W Harris ("the judge") on 29 January 2015. The appellant did not advance any human rights arguments and sought only to argue that the decision was not in accordance with the Immigration Rules. In a decision promulgated on 13 February 2015, the judge dismissed the appellant's appeal on the basis that he did not have jurisdiction to decide the appeal under the Immigration Rules. He explained his reasoning at paragraphs 11 and 12:

> "11. For the appellant's argument about having the right to appeal on the ground that the decision is not in accordance with the Rules to succeed, I find that at the least he needs to identify the existence of a right of appeal in 1973 that would allow him to challenge a refusal of entry clearance under the rules.
>
> 12. At the time of the Standstill Clause taking effect, the appeal rights existing to the equivalent of the First-tier Tribunal were those contained in the Immigration Act 1971, particularly as set out in Part 2 of the Act. However, as the case has been put before me, I am not satisfied that the appellant has identified that under the 1971 Act a person refused entry clearance had a right of appeal in 1973."

4. The appellant, in his application for permission to appeal, argued that the judge had made a material error of law in failing to recognise that he had a right of appeal under the Immigration Act 1971 ("the 1971 Act"). Permission was granted by First-tier Tribunal Judge McCartney on 14 May 2015.

The Upper Tribunal Hearing

Error of Law

5. Having heard submissions by Mr Ali, for the appellant, and by Mr Bramble, for the respondent, we announced our decision at the hearing that the judge had made a material error of law in finding that he did not have jurisdiction to hear the appeal. Our reasons are as follows.

6. Turkish nationals, such as the appellant, can rely on Article 41(1) of the Additional Protocol to the EEC -Turkish Association Agreement ("the Ankara Agreement"), under which the UK must refrain from introducing any new restrictions on the freedom of establishment and freedom to provide services on Turkish nationals. In other words, the UK cannot impose conditions for business appellant's from Turkey that are less favourable then those which were in force when the UK became bound by the Ankara Agreement on 1 January 1973. Article 41(1), known as "the standstill clause", applies to procedural as well as substantive conditions governing entry into the UK. See C-16/05 R (on the application of Veli Tum and Mehmet Dari v SSHD) ("Article 41(1)...is to be interpreted as prohibiting the introduction...of any new

restrictions on the exercise of freedom of establishment, including those relating to the substantive and/or procedural conditions governing first admission...")

7. The appeal rights that would have applied to the appellant on 1 January 1973 are those set out in Part II of the 1971 Act. Section 13(2) of Part II of the 1971 Act provides as follows:

> "Subject to the provisions of this Part of this Act, a person who, on an application duly made is refused a certificate of patriality or an entry clearance may appeal to an adjudicator against the refusal"

8. It is clear that the appellant had a right of appeal under this section of the 1971 Act. Accordingly, the decision of the judge that he did not have jurisdiction to decide the appeal was a material error of law which must be set aside.

9. Both parties told us they were ready for us to remake the decision and we therefore proceeded to do so.

The Remade Decision

The Respondent's Decision of 10 October 2013

10. On 10 October 2013 the respondent refused the appellant's application for entry clearance to establish a hair dressing business. The respondent did not accept the business proposal was genuine or viable and the following reasons for refusal were given:

    a. The appellant was unable at interview to provide specific details of the business plan

    b. He was unable to provided evidence as to the financial costs in running the business

    c. His current business in Turkey had not declared any profits in the previous financial year and he had not explained why the UK business would be more successful

    d. He had not identified a specific business he proposed to purchase

    e. He had not satisfactorily researched the market or running of a business and was unable at interview to comment on the market

    f. He could not speak English and it was unclear how he could run the business by relying on an English and Turkish speaking employee and he had not sought to improve his English before relocating

    g. He had not provided evidence of his spouse's personal or financial circumstances in order to explain how she would be able to support him

    h. He had not provided sufficient evidence of the source of funds deposited into his account or explained them given their inconsistency with his present business' profits

i. He had not explained his expected costs of running the business and living in the UK and provided evidence that the profit will be sufficient to support him and his dependents

The Appellant's Submissions

11. Mr Ali relied upon his skeleton argument. He observed that the respondent had three heads of refusal: that the appellant was not genuinely setting up a business; that he would not be able to bear the liabilities of the proposed business; and that there would not be sufficient profits. Mr Ali stressed that the appellant's proposed business must be considered in the proper context - that he was only intending to establish a small one man hairdressing business - and we should not lose sight of this when considering the business plan and preparation undertaken by and on behalf of the appellant.

12. Mr Ali submitted that the appellant had appropriately answered the questions put to him by the respondent and had a viable and realistic business plan supported by evidence. The appellant was serious about setting up the business and had taken advice from, and had a business plan prepared by, lawyers. Mr Ali proceeded to take us through the business plan.

13. The business plan provides that the appellant will purchase a leasehold premises for a hairdressing salon in North or East London and, at least initially, he will serve primarily the Turkish community in London. He will be a sole trader and will hire on a part time basis an assistant who speaks both English and Turkish on minimum wage. The plan states that he has access to funds amounting to up to £60,000, comprising of £20,000 in cash, £30,000 from the sale of a property and £10,000 from the sale of his car. The plan calculates a total start up requirement of £19,459. The plan provides that the employee cost will be £6,239 a year and his drawings will be £11,000 a year for the first three years of the business. Sales forecasts are given as £45,410 in the first year, increasing annually by 7-15% based on an assumption he will provide services to 86 clients at approximately £900 a week. The plan shows a net profit of between £5,000 and £6,000 annually in the first three years. Mr Ali commented that the projections and assumptions are reasonable and that there is no reasonable basis to dispute them. He noted they had not been directly challenged. The start up funding leaves more than enough money for ongoing costs, given the funds available to the appellant.

14. Mr Ali drew to our attention the annexes to the business plan which included print outs from the internet showing a quote for public liability insurance, course fees at the East London School of English, rooms for rent in Bethnal Green, London and the surrounding area, pricing for flyers at Vistaprint, advertising costs in Haber (a Turkish language paper) and brief information on three barber shops for sale, printed from the websites Gumtree.com and ukbusinessesforsale.com. One of the barber shops is on Cricklewood Broadway (North West London) and has a price of £15,000; another is in South East London (no further information on the location is given) and priced at £15,000, and the other is priced at £13,999 and in the Bethnal

Green (East London) area. Mr Ali submitted that the annexes supported and were consistent with the figures used in the business plan. They also showed that the appellant had thought about the need to learn English and find inexpensive accommodation

15. Mr Ali submitted that the availability of funds to the appellant had been established with sufficient and appropriate evidence. He referred to paragraphs 13-15 of the appellant's witness statement where the available funding is explained. He noted the supporting evidence in the form of statements from banks and a letter from the appellant's wife in which she confirmed she had given her husband 42,885.42 Turkish lira, the equivalent of £12,0147, and that she had a further £12,572 in GBP accounts that were available for him. He noted the letter from her employer confirming her employment and salary. In addition, the appellant had over 20,000 Turkish lira in his name, as evidenced by a letter from HSBC and bank statements. Accordingly, there was appropriate evidence to support the appellant's ability to fund the proposed business.

16. Mr Ali acknowledged that whilst the appellant's lack of English might make setting up a business more difficult, it by no means made it impossible. The business plan took this into account by allowing for the hiring of a worker who speaks English. The proposed business was straight forward and the worker would be able to assist the appellant as necessary. The nature of the work did not require a good command of English.

17. In sum, the appellant's position, as articulated by Mr Ali, was that he had a reasonable and well thought out business proposal that could be properly funded by available funds.

The Respondent's Submissions

18. Mr Bramble referred to the Entry Clearance Officer's decision which he thought set out reasonable and real concerns. He noted in particular the appellant's lack of English and the difficulty he would have managing a business in light of this. He submitted that the appellant is planning to start a business not join an existing one and the lack of English would make this particularly challenging. Reliance on a minimum wage bilingual worker does not seem realistic. Mr Bramble questioned whether the appellant had sufficient funds to cover the cost of living and all planned expenses such as English lessons, whilst the business was starting up. There was insufficient detail about the proposed sale of the appellant's car and property. Nor was there information about the source and continuing availability of the funds being sourced from the appellant's wife, which seem very high relative to her income. Mr Bramble also submitted there had been no explanation of the source of appellant's funds which was significant given they were inconsistent with the information provided on the profitability of his current business.

<u>Findings and Reasons</u>

19. The appellant's application must be decided under the 1972 Immigration Rules (HC 509 and HC510) as these were the Rules in force on 1 January 1973. Paragraphs 30 – 32 of HC509 set out the requirements under the 1972 Rules relevant to the appellant's appeal.

> '30. Passengers who have obtained entry clearances for the purposes of establishing themselves in the UK in business, whether a new or existing business, should be admitted for a period not exceeding 12 months with a condition restricting their freedom to take employment. Passengers who are unable to present such a clearance but nevertheless seem likely to be able to satisfy the requirements of one of the next two paragraphs should be admitted for a period of not more than two months, with a prohibition on employment, and advised to present their case to the Home Office.
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> 31. For an applicant to obtain an entry clearance for this purpose he will need to show, if joining an established business, that he will be bringing money of his own to put into the business; that he will be able to bear his share of the liabilities; that his share of the profits will be sufficient to support him and his dependants; that he will be actively concerned in the running of the business; and that there is a genuine need for his services and investment. The accounts of the business for previous years will require to be produced, in order to establish the precise financial position. An entry clearance will not be issued where it appears that the proposed partnership or directorship amounts to disguised employment or where it seems likely that, to obtain a livelihood, the applicant will have to supplement his business activities by employment for which a work permit is required.
>
> 32. If the applicant wishes to establish in business in the UK on his own account, he will need to show that he will be bringing into the country sufficient funds to establish a business that can realistically be expected to support him and any dependants without recourse to employment for which a work permit is required.'

20. In applying the 1972 Rules, we are mindful that our approach must be consistent with the law and practice in 1973. As noted by the Upper Tribunal in <u>Akinci (paragraph 21 HC 510 – correct approach)</u> [2012] UKUT 00266 (IAC) the 1972 Rules "are considerably more favourable with respect to migration for business purposes than those prevailing today". In <u>EK (Ankara Agreement – 1972 Rules – Construction) Turkey</u> [2010] UKUT 425 (IAC) the Upper Tribunal made the following observations.

> "23. In 1973 the Rules themselves were an open textured exercise in discretion in the round having regard to the general policy and particular factors identified; so was the practice in applying them …
>
> 24. … It was certainly the case in 1972 and for a number of years thereafter that the Home Office recognised that a business often needed some time to turn a profit and

> losses in the early years were not inconsistent with a business that met the policy and purposes of the Rules in general. The case was always considered in the round."

21. The appellant must discharge the burden of proof and the standard of proof is the balance of probabilities.

22. We have taken into account all of the evidence presented including in particular the appellant's business plan, the supporting evidence for the plan, the evidence of available funds and the appellant's witness statement.

23. In assessing whether the appellant meets the requirements in HC509 we have kept in mind that the 1972 Rules were far less stringent than those applying to businessmen under the current Immigration Rules HC395.

24. Having considered all of the evidence in the round, we find that the appellant has not met the requirements of the 1972 Rules and therefore his appeal should be dismissed. Our reasons are as follows.

25. We are not satisfied that the appellant has demonstrated how he will overcome the difficulty of running his own business whilst not speaking English. In his business plan he says he will be employing an English speaking part time employee paid £6.19 an hour for 18 hours a week. Mr Ali has submitted that this employee will be able to assist with managing and running the business. Based on the evidence and submissions, we find that the appellant has not properly considered and thought out how his business can and will be viable when he does not speak English. Had he been joining an existing business, or had he been able to rely on a support network of family and friends to assist in administration and management, his lack of English might more easily have been overcome. However, we do not accept that the appellant's plan of relying on a part time minimum wage bilingual employee is one that has been sufficiently developed for us to accept that the business plan is a genuine and realistic one. Accordingly, we do not accept that the business, as proposed, is one that can realistically be expected to support the appellant.

26. We have carefully considered the business plan and are not satisfied that it represents a genuine and individually thought out plan by the appellant to set up a business in the UK that he will be able to successfully manage given his lack of English. The appellant has said that he proposes to serve the Turkish community in the UK but there is no indication that the appellant proposes to locate the business in a predominantly Turkish part of London – on the contrary, the plan refers to the hair dressing salon being in "North or East London" and the three premises annexed to the plan are all in different parts of London rather than concentrated in an area that might be suitable for the targeted demographic. There is no indication that the appellant has carried out market research or has an understanding of the market in which he would operate. In his witness statement he indicates that he has relied on professional advisors (by which we presume he means his solicitors) for this. The annual costing for an employee of only £6,239 seems entirely insufficient when the appellant will be dependent on this employee for English language communication. The sales forecasts in the business plan also seem questionable. They are based on an

assumption that he will earn approximately £900 a week. One of the three barber shops whose brief details are annexed to the plan refers to average weekly takings of £650-£850; another refers to weekly turnover of £636. The third shop does not give a figure. The appellant has not explained why it is reasonable for him to forecast that he will have higher weekly takings. Nor does his forecast appear to sufficiently take into account that his takings may be substantially lower in the first several months of operating the business.

27. The cost of setting up the business will be substantial. The appellant's assumed start up funding requirement, as set out in the business plan, is £19,459. In addition, he will need to fund his living costs (accommodation, food etc) along with English language classes. It is not clear how long the appellant will be in the UK before he locates suitable premises and starts operating and making a profit. The appellant's capital requirements are therefore likely to be substantially more than £19,459. We are not satisfied that the appellant will be bringing into the UK sufficient funds to cover these. Based on the appellant's evidence, the funds in his name amount to less than £7,000. To make up the shortfall, the appellant is reliant on a significant transfer from his wife and/or the sale of assets of which we have been provided very little information. The appellant's wife has written a letter in which she confirms she has almost £25,000 available to support her husband. She states that this will not affect her financial situation as she has good income and financial background. Bank statements and a letter from her employer have been provided in support to confirm what she has said in her letter. However, although the appellant's wife may have said she has given the funds and/or will make them available to the appellant, the fact remains that the money has not been transferred into the appellant's name. Nor have we had an explanation as to the source of the funds. Having considered all of the information provided by the appellant's wife, we are not satisfied that the money presently in her name will, on the balance of probabilities, be available to the appellant to invest in the proposed business.

28. For these reasons, and having looked at the application in the round, we do not accept that the requirements of the 1972 Rules have been met.

NOTICE OF DECISION

The decision of the First-tier Tribunal contains a material error of law such that it must be set aside and remade.

We remake the decision and dismiss the appeal.

The appellant has not requested anonymity and we make no anonymity direction.

Signed Date

Deputy Upper Tribunal Judge Sheridan