



IAC-AH-CJ-V1

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

Appeal Numbers: IA/32416/2014  
IA/32423/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 6 April 2016**

**Decision &  
Promulgated  
On 14 April 2016**

**Reasons**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE SHAERF**

**Between**

**FATMA YILMAZ  
AYDIN YILMAZ  
(ANONYMITY DIRECTION NOT MADE)**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellants: Mr M Aslam, of Linkworths Solicitors  
For the Respondent: Mr C Avery of the Specialist Appeals Team

**DECISION AND REASONS**

**The Appellants**

1. The Appellants, Fatma Yilmaz and Aydin Yilmaz, are wife and husband born respectively on 9 October 1983 and 21 December 1985. They are citizens of Turkey. On 23 February 2016 Judge of the First-tier Tribunal

Colyer granted the Appellants permission to appeal the decision of Judge of the First-tier Tribunal Blundell promulgated on 16 September 2015 by which he dismissed the wife's appeal against the Respondent's decision of 13 July 2014 to refuse to vary her leave to remain by way of reference to paragraph 21 of HC 510 implementing the terms of the Ankara Agreement in relation to her proposal to set herself up in business as a domestic and commercial cleaner and the appeals of both Appellants against the refusal of their claims under paragraph 276ADE(1) of HC 251 (the current Immigration Rules) and also with reference to their right to a private and family life protected outside the Immigration Rules by Article 8 of the European Convention.

2. The Appellants sought permission to appeal on the following grounds:-

- (1) The Judge had erred in finding the wife's failure to attend for interview by the Respondent to have been deliberate and to have been a matter relevant for consideration by reason of paragraph 4 of HC 510. The grounds assert she had not deliberately avoided attending for interview by the Respondent and did not meet any of the adverse criteria referred to in paragraph 4. There had been a telephone interview and the Respondent had not shown any evidence of a formal request to the Appellant to attend a face-to-face interview.
- (2) The wife's "intentions" were not relevant to an assessment of her appeal by reference to paragraph 21 of HC 510 which required the decision maker to limit himself to the substance and merits of the wife's application. Additionally the wife's lack of English was not relevant to the running of her intended business which was intended to serve the Turkish and Kurdish communities. Cleaning did not require formal training.
- (3) The Respondent had not challenged whether the wife would be able to support herself and her husband from the profits of her intended business and the Respondent had not challenged the Appellant's business plan or the viability of the proposed business. There had been no challenge to the financial forecasts in the business plan.

The Judge's consideration of the Appellant's business plan, the viability of her business and whether she would be able to support herself and her husband from its profits had not been raised by the Respondent and the Judge's consideration of them amounted to a procedural unfairness.

### **The Upper Tribunal Hearing**

3. An interpreter had been booked and appeared in the Tribunal room towards the end of the hearing. She later told me she had been in the interpreters' room since 9.30am. In the event her services were not used although had she appeared at an earlier stage of the proceedings they would doubtless have improved the quality of the Appellants' experience

of the hearing. The Appellants were not required actively to participate in the hearing save to confirm their current address.

### **Submissions for the Appellants**

4. Mr Aslam acknowledged the Judge's summary at paragraphs 6–8 of his decision of the Respondent's reasons for refusing the claims of both Appellants. He emphasised that at paragraphs 33–36 the Judge had found the wife had not been served with any notice bringing her leave to an end and so her leave had not been curtailed. He then turned to paragraph 39 of the Judge's decision and in particular his finding that the wife had deliberately avoided being interviewed by the Respondent. It was accepted she had not attended for interview. The fact was that there was no legal requirement for her to attend an interview and no formal notice of such requirement had been given. He submitted that consequently it could not be said that the wife did not meet the desiderata identified at paragraph 4 of HC 510.
5. At paragraphs 6 and 7 of the Judge's decision he had queried the genuineness of the wife's intention to establish herself in business by reason of the timing of her application, made in May 2014 subsequent to the refusal following an oral hearing on 8 May 2014 to grant permission for judicial review. He had also found the wife's proposed business was not viable because of her lack of English and lack of "start-up" funding. At paragraph 41 the Judge considered that of more concern than the apparent lack of funding was the wife's timing of her application leading to the decision under appeal and how that reflected on her intentions. Mr Aslam submitted the Judge had erred in looking at the wife's intentions before considering the substance of her application. Additionally at paragraph 44 he had taken issue with her apparent lack of facility in English although subsequent to her application she had taken some lessons. He had not made any specific findings how this impacted on his decision or on what he had recorded at paragraph 22 of his decision. Facility in English was not an important factor because she intended to conduct her business within the Turkish and Kurdish communities.
6. The Judge had referred at paragraphs 43 and 44 to the wife's lack of business experience. This went to the issue of viability rather than intention. However, the Judge had been in error in treating the wife's situation as similar to that of a wife with considerable training having the ability to earn considerable sums staying at home with young children. Domestic and commercial cleaning required no training or special skills and the possession or application of skills was not a requirement imposed by paragraph 21 of HC 510.
7. The grounds for permission to appeal at paragraph 10 identified areas which the Respondent had not raised as reason to refuse the wife's application but the Judge had addressed them at paragraphs 43–46 and this procedural error was a material error of law.

8. I pointed out that the first half of page 3 of the Respondent's Reasons for Refusal Letter 30 July 2014 did query whether the wife's proposed business would be viable although perhaps not in the clearest of terms. Mr Aslam continued that the Respondent had failed to consider the Appellant's business plan which had been sent to her on 4 July, almost four weeks before the decision under appeal was made on 30 July 2014. The Judge had not considered the detail of the business plan in his decision. These were material errors of law such that the decision should be set aside.

### **Submissions for the Respondent**

9. Mr Avery submitted the decision was a very thorough one and disclosed no material error of law. Paragraph 4 of HC 510 provided that meeting the requirements of the relevant Immigration Rules was not conclusive. The decision maker had to look at all the relevant circumstances of which paragraph 4 listed some examples. At paragraph 28 of the Judge's decision he had referred to the nature of the Immigration Rules in 1973 of which HC 510 is a part. He found at that time "the Rules ... were an open textured exercise in discretion in the round having regard to the general policy and particular factors identified; so was the practise in applying them ..." The Judge had looked at all the relevant circumstances, those identified in paragraph 4 of HC 510 were examples and not an exhaustive list and the conclusions which the Judge had reached at paragraph 39 of his decision were sustainable, even taking into account the content of the wife's statement of 17 August 2015 prepared shortly before the hearing in the First-tier Tribunal.
10. Intention was a relevant aspect in the assessment of the viability of any proposed business because if there was no intention then it could not be said there was a real business. The Judge had rightly identified at paragraph 28 that the rationale of the Ankara Agreement and the Rules made consequent upon it was the facilitation of genuine economic activity. The lack of intention to operate a real business was fatal to meeting the requirements of paragraph 21 of HC 510. If the wife did not intend to run a business then consideration of its viability was effectively an academic exercise. Nevertheless the Judge had dealt expressly with viability at paragraphs 45 and 46 of his decision and found that even if domestic and commercial cleaning was itself unskilled work, the wife would require certain skills and abilities successfully to operate her business. The wife had failed to address the weaknesses identified in her claim and the Judge had made no material error of law. His decision should stand.

### **Further Submissions for the Appellants**

11. Mr Aslam added that if the Tribunal was not with the Appellants on the basis of his submissions, it should take into account of the Respondent's failure fully to address the criteria of paragraph 21 of HC 510 in the reasons letter and that the Appellants could not be expected to address issues not raised by the Respondent. There had been no challenge to the

wife's business plan, only challenges to the wife's funding obtained from her father and her lack of facility in English. The Respondent had failed to address the criteria of paragraph 21 of HC 510 and indeed the first time they had been addressed was by the Judge at paragraph 46 of his decision but these issues should have been put to the Appellants at the hearing. The decision contained material errors of law and should be set aside.

### **Findings and Consideration**

12. These appeals focus on paragraphs 4 and 21 of HC 510 which the Judge reproduced at paragraph 24 of his decision. The Judge found at paragraph 35 that the wife's leave had not been curtailed or otherwise come to an end. In her statement of 17 August 2015 the wife gives some explanation why the first half of 2013 was personally very difficult for her as the Judge set out at paragraph 37 of his decision. The gravamen of the findings adverse to the wife at paragraph 39 of the decision is that she did not maintain contact with the Respondent but I find it cannot be said that the failure to maintain contact was an accident. There was therefore a degree of deliberation or decided reluctance about maintaining contact. The two appearances of the word "deliberate" or a cognate" at paragraph 39 are perhaps unnecessary but if they are excised from the paragraph the sense and findings remain intact and consonant with and adequate for the subsequent findings made by the Judge. It is to be noted that he made his comments at paragraph 39 in the light of his opening comment in the paragraph acknowledging that the wife had leave until November 2014.
13. At the hearing the wife told the Judge that she had enrolled on an English course in June 2014 (after her application and shortly before the Respondent's decision) and had last attended class sometime in 2014 but she was unable to remember the date. There was no explanation before the Judge why the wife's application was made three weeks after her husband's own appeal had effectively come to an end and yet it was some five months or more before on the most generous reading, her leave expired in November 2014. The timing was an obvious issue which the wife has failed to address. This coupled with her previous desire not to or failure to maintain contact with the immigration authorities does not lend support to her claim to intend to establish herself in business. The wife was questioned about aspects of her business plan at the hearing before the Judge. The Record of Proceedings shows that questions were raised about her professional indemnity insurance policy for business risks. Her reply indicated some lack of understanding about the nature of and reason for such a policy of which, incidentally, no mention is made in her business plan or budget.
14. The Judge noted at paragraph 28, to which reference has already been made, that the rationale behind the agreement, the facilitation and implementation of which HC 510 is an essential part, is to facilitate genuine economic activity. I accept the Respondent's submissions that

the intention to establish and operate a business is an important factor in assessing the viability of the business. Nevertheless, it is a truism in this jurisdiction that it is difficult to assess intention.

15. The wife's appeal succeeds if there are insufficient or no adverse factors which are of a material nature identified in paragraph 4 of HC 510 and if she meets the requirements of paragraph 21. The Judge made findings about the viability of the proposed business. At paragraph 46, he gave sustainable reasons for considering the wife's proposed business not to be viable. These were based on hearing her evidence and examination of the documents relating to the proposed business. The grounds for appeal refer to the Appellant's business plan. The financial information in the monthly expenditure list at page 102 of the Appellant's bundle filed on 9 March 2015 at pages 102 and for her intended business at page 184-192 are unsupported by, in the case of the living expenses, any documentation whatsoever. The financial summary at page 184 is materially different even for the first year of the three year financial projections. . I conclude that the Judge had good reason to reach his conclusion that the proposed business was not viable set out in paragraph 46 of his decision without relying on issues of the history of the wife's relations with the immigration authorities, lack of English and unexplained timing of her application.
16. There was no challenge to the Judge's findings on the claims made by way of reference to paragraph 276ADE(1) of the Immigration Rules or Article 8 or otherwise engaging Article 8 of the European Convention. It follows that the decision of the First-tier Tribunal did not contain any errors of law such that it should be set aside and it shall stand.

### **Anonymity**

17. There was no request for an anonymity direction or order and I see no reason to make one.

### **NOTICE OF DECISION**

**The decision of the First-tier Tribunal did not contain any material errors of law and shall stand.**

**The appeal of each Appellant is dismissed.**

**No anonymity direction is made.**

Signed/Official Crest  
2016

Date 12. iv.

Designated Judge Shaerf

A Deputy Judge of the Upper Tribunal