Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/12540/2015
IA/12542/2015 & IA/12543/2015

THE IMMIGRATION ACTS

Heard at : Field House	**Decision Promulgated**
On : 25 May 2017	**On : 05 June 2017**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

MRS AYTEN SATILMIS
[A A S]
[A S]

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms G Peterson, instructed through Direct Access
For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants, a mother and her two children, are citizens of Turkey, born respectively on 20 August 1977, [ ] 2004 and [ ] 2009. They have been given permission to appeal against the decision of First-tier Tribunal Judge Grant, dismissing their appeals

against the respondent's decision to refuse their applications for indefinite leave to remain as the dependants of a Turkish EC Association Agreement (ECAA) businessperson, Mr Serdal Satilmis, the first appellant's husband and the father of the children.

2. Mr Satilmis, the sponsor, first come to the UK under the provisions of the Ankara Agreement with limited leave valid until 31 August 2014 granted under paragraph 21 of HC 510. In accordance with paragraph 35 of HC 509 the appellants were granted limited leave commensurate with the sponsor's leave, valid until 31 August 2014, and entered the UK on 11 June 2014 to join him. On 27 August 2014 the sponsor, together with the appellants, applied for indefinite leave to remain under paragraph 28 of HC 510. The sponsor was granted indefinite leave to remain on 12 February 2015. The appellants' applications were, however, refused in a decision dated 11 March 2015.

3. The respondent refused the appellants' applications under paragraph 41 of HC510 which outlined the business requirements under the 1973 immigration rules. The respondent relied on page 66 of the Business Applications under the Turkish EC Association Agreement modernised guidance which required that the first appellant had been living together in the UK with the Turkish ECAA business person for a period of at least two years. The respondent was not satisfied that she had been living with the sponsor for a period of at least two years. The second and third appellants' applications were then refused on the basis that the respondent was not satisfied that both their parents were lawfully present in the UK.

4. The appellants appealed against that decision. Their appeal was heard on 15 December 2015 by First-tier Tribunal Judge E B Grant. It was argued before the judge that the modernised guidance had made the exercise by a Turkish national of the freedom of establishment in the UK subject to more restrictive conditions than those applicable at the date of entry into force of the Additional Protocol and was therefore impermissible and unlawful under Article 41(1) of the Additional Protocol. It was argued further that the restrictive conditions were only to be found in the guidance, and not the 1973 Rules, and were therefore unlawful, in accordance with the principles set out in Alvi, R (on the application of) v Secretary of State for the Home Department [2012] UKSC 33. It was also argued that the respondent had applied the wrong part of HC 510, as paragraph 41 applied to EEA citizens; that the respondent ought to have applied paragraph 28 of HC 510; and that the refusal was not in accordance with the law and was in breach of the appellants' Article 8 rights.

5. Judge Grant found that paragraph 41 was not the relevant provision to apply, as it applied to EEA citizens. She found that paragraph 28 was the relevant provision, but that there was no mandatory requirement in paragraph 28 for permission to be granted, as in the case of EEA family members. She found that it was irrelevant whether or not the modernised guidance applied as there was no requirement within the original Ankara Agreement Rules for the appellants to be granted indefinite leave to remain in line with the sponsor. She dismissed the appeals on that basis and on Article 8 grounds.

6. The appellants sought permission to appeal to the Upper Tribunal on the grounds that the judge had failed properly to engage with the legal arguments before her and had upheld an unlawful decision made by the respondent.

7. Permission to appeal was initially refused, but was subsequently granted on a renewed application on 9 November 2016 on the basis that it was arguable that the modernised guidance imposed conditions more restrictive than those in place as at the date of the Additional Protocol (Art 41(1)) and was therefore unlawful.

Appeal Hearing

8. The matter came before me on 25 May 2017, having previously been adjourned to await the outcome of the President's decision in R (on the application of Aydogdu) v Secretary of State for the Home Department (Ankara Agreement - family members - settlement) [2017] UKUT 167.

9. Ms Peterson advised me that the appellants were pursuing their appeals, despite the findings in Aydogdu. There then followed some discussion as to the position further to the decision in Aydogdu, which concerned facts identical to those of the appellants before me, albeit in the context of judicial review proceedings rather than a statutory appeal. It was agreed by all parties that the appellants' appeals fell within the old appeals system, prior to the changes made by the Immigration Act 2014, and thus the full range of grounds of appeal under section 84 of the Nationality, Immigration and Asylum Act 2002 were open to them, including the ground "*that the decision is otherwise not in accordance with the law*", as stated in the refusal decision.

10. It was noted that the Secretary of State, in the case of Aydogdu, had expressly acknowledged that the refusal of the application under paragraph 41 of HC 510 in that case was fundamentally in error. Indeed, the outcome of the proceedings was that the decision in the application was quashed. It was also acknowledged that the Secretary of State had, as a result of the decision in Aydogdu, since withdrawn the modernised guidance and was revising the guidance.

11. Ms Peterson submitted that, whilst it remained her position, contrary to the findings in Aydogdu, that there was provision for settlement under paragraph 28, the position following the decision in Aydoglu was that there were no categories under which the appellants could have applied. She did not accept, as suggested in Aydogdu, that the appellants' application ought to have been considered under Appendix FM, since that imposed more restrictive conditions than under the 1973 rules and was thus not permitted under the "standstill clause". Her submission was that the respondent had made an unlawful decision and that Judge Grant ought, therefore, to have allowed the appeals on the basis that the decision was not in accordance with the law and referred the matter back to the Secretary of State to make a lawful decision, either by granting settlement under paragraph 28 of HC 510 or by creating a new category for people lawfully in the UK under the Ankara Agreement. She therefore asked that the appeal be allowed, Judge Grant's

decision set aside and that the decision be remade by allowing the appellants' appeal on the basis that the respondent's decision was otherwise not in accordance with the law.

12. Mr Wilding accepted that there was logic to the suggestion that the matter be remitted to the Secretary of State, but submitted that that did not properly dispose of the issue before the Upper Tribunal, namely whether Judge Grant had made an error of law in her decision. He submitted that the judge had not made any error of law in her decision. She had not needed to consider or follow the principles in Alvi, as she did not dismiss the appeal on the basis of the guidance. The basis upon which she had dismissed the appeal was that paragraph 28 of HC 510, the relevant rule, did not require that the appellants be granted settlement. Such a conclusion had been confirmed in Aydogdu as the correct one. The President, in Aydogdu, found that the sponsor's settled status took him and his family outside the Ankara Agreement and therefore the question of Ankara Agreement rights fell away, which is what Judge Grant found. Mr Wilding relied on the decision in CP (Section 86(3) and (5); wrong immigration rule) Dominica [2006] UKAIT 00040 in submitting that it was not the case that the only proper course would be for the matter to be remitted to the Secretary of State when the wrong rule had been applied, particularly when there was no right rule that could be applied.

Consideration and Findings

13. The outcome of the case of Agdogdu, and the possible lacuna in the immigration rules identified in that case, has somewhat complicated matters in this appeal. However, after some considerable deliberation I find myself in agreement with the submissions made by Mr Wilding. Whilst, in a case such as the appellants' where it is accepted that the respondent applied the wrong immigration rules, a logical step would be for the matter to be remitted to the Secretary of State for a decision to be made within the correct immigration rules, that does not necessarily mean that Judge Grant erred in law in making the decision that she did. Mr Wilding relied on the case of CP (Dominica) in which similar issues arose. In that case, the Upper Tribunal found as follows (I have highlighted the most pertinent sections):

> 16. "Reading these provisions together, we are left in no doubt that they impose a legal duty upon decision-makers acting to regulate entry and stay in the UK to apply the immigration rules and, specifically, to apply the correct immigration rule applicable to the circumstances put forward by the individual in his application to entry or stay in the UK. The matter can, perhaps, be tested in this way. If it were not for the appellate system operating in immigration cases, legal challenges to decisions by those officials making decisions under the Immigration Acts and the immigration rules would be brought by way of applications for judicial review in the Administrative Court. We have no doubt that an Administrative Court Judge would have no difficulty in concluding that the decision-maker acted unlawfully if he had applied the wrong immigration rule. It is axiomatic in a public law context that a decision-maker acts unlawfully if he makes a decision on the wrong legal basis, for instance by applying the wrong legal provision. *Mutatis mutandis*, with the appellate system we actually have in place, such a decision is "not in accordance with the law ".

17. What does this mean for the application of sections 86(3) and (5) of the 2002 Act? It seems to signify that the appeal, at least to some extent, should be allowed under section 86(3). We emphasis the words "to some extent" because, for the reasons we now give, in the usual case the immigration judge will go on to determine the appeal on the basis of the correct rule and the evidence before him. The effective outcome of the appeal will be determined by that process.

18. **It is within the collective experience of the members of the Tribunal sitting in this case that the approach taken at the hearing is the normal one followed where the original decision-maker applies the wrong immigration rule.** Of course, an Immigration Judge is not under an obligation to "embark upon a roving expedition among the rules" for a rule that applies to the claimant's case (Uddin v IAT [1991] Imm AR 134 at p 144 *per* McCowan LJ). However, once the correct rule is identified, it is the Immigration Judge's obligation to apply that rule, subject to the requirements of fairness so that the parties have a proper opportunity to deal with the relevant evidential and other issues that arise. The issue of fairness will most likely arise where the substance of the correct rule differs from that applied by the decision-maker or where the appellant is unrepresented at the hearing.

19. If the appellant succeeds on the evidence under the correct rule, the appeal will, of course, be allowed in substance and not merely because the original decision was legally defective having been made under the wrong rule.

20. If, by contrast, as in this case any (or all) of the requirements of the correct rule are not satisfied, the appeal will be dismissed in substance. For the reasons we have already given, the decision is "not in accordance with the law" but the fault in the decision as made is for all practical purposes cured by the appellate process. The appeal must be allowed to that limited extent but the appellant's victory will be Pyrrhic. There is no outstanding application before the decision-maker and no question of the Immigration Judge directing further consideration of the appellant's application.

22. The practical effect of the approach we set out above is that cases of this sort will be, if at all possible, decided by Immigration Judges on the evidence at a hearing. The legislation does, after all, give the Tribunal a fact-finding role in immigration cases. It will avoid the unnecessary cycle of appeals being routinely allowed for the original decision-maker to consider the appellant's application again"

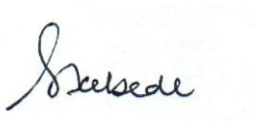
14. Accordingly, whilst it was open to Judge Grant to have allowed the appeals on the basis that the decision was not in accordance with the law, that was not the only option to her and, following the guidance in CP (Dominica), she proceeded to consider what the appellants submitted, and she identified, was the only available applicable rule, namely paragraph 28 of HC 510. She went on to give full and cogent reasons for concluding that the appellants could not benefit from that provision because it did not give rise to any mandatory requirement for indefinite leave to remain to be given to dependants of Ankara Agreement sponsors. As Mr Wilding submitted, such a conclusion was the same as that reached in Aydoglu where the President found that the sponsor's settled status took him and his dependants outside the scope of the Ankara Agreement and the "stand-still clause", and there was therefore no purpose served by remitting the matter to the Secretary of State in circumstances where there was no other rule under which the applications could be considered.

15. I am also in agreement with Mr Wilding's submission in response to the grounds asserting that the judge's consideration of the guidance failed to take account of the principles in Alvi. It is clear that, whilst the judge gave consideration to the guidance, both the 2008 guidance and the modernised guidance, she did so in response to the grounds of appeal and submissions made before her, but that did not form the basis of her decision. Her findings at [16] made it plain that her decision was based upon paragraph 28 of HC 510 and the Ankara Agreement Rules in general, irrespective of the guidance.

16. For all of these reasons I conclude that the judge was entitled to reach the conclusions that she did in regard to the appellants' eligibility under the Ankara Agreement. It was open to her to deal with the appeals in the way that she did and there was nothing unlawful about her approach or in the decision that she reached. The grounds do not challenge her findings on Article 8 and I find, in any event, that she was entitled to conclude as she did in that regard. I therefore uphold the judge's decision and find that she did not err in law. There are no material errors of law in her decision.

DECISION

17. The making of the decision of the First-tier Tribunal did not involve an error on a point of law requiring it to be set aside. The decision to dismiss the appeals stands.

Signed: 

Upper Tribunal Judge Kebede Dated: 26 May 2017