Upper Tribunal
Immigration and Asylum Chamber

JR/268/2019

Field House,
Breams Buildings
London
EC4A 1WR

Heard on: 26th July 2019

BEFORE

UPPER TRIBUNAL JUDGE KEITH

Between

The Queen (on the application of Sevket Bozdag)

Applicant

v

Secretary of State for the Home Department

Respondent

Mr G Dingley instructed by London Solicitors, on behalf of the Applicant
Mr J Anderson instructed by the Government Legal Department appeared on behalf of the Respondent.

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APPLICATION FOR JUDICIAL REVIEW
JUDGMENT

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The application

(1) The applicant applied on 16 January 2019 for judicial review of, and interim relief from, the respondent's decision of 17 October 2018, (the 'Decision'). The Decision was an administrative review decision maintaining the previous refusal on 11 September 2018, of the applicant's application for entry clearance as a business person under

the EC Association Agreement ('ECAA'). The applicant, a Turkish national, challenged the Decision on four grounds.

Grounds

(2) Ground (1) was that in reaching her Decision, the respondent had breached the common law duty of fairness. She had done so by failing to follow up, for the purposes of clarification, in the event that she had concerns about the genuineness of the applicant's business proposals. This was by analogy with the cases of R (Anjum v ECO (Islamabad (entrepreneur – business expansion – fairness generally) [2017] UKUT 00406 (IAC) and R (Mushtaq) v SSHD, Pakistan (ECO – procedural fairness) [2015] UKUT 0024.

(3) Ground (2) was that the respondent's Home Office Guidance dated 16 March 2018, which included consideration of the genuineness of an enterprise by reference to a person's particular qualifications (for example at page [63]) was not required in the Immigration Rules. The Guidance amounted to a stricter standard than for non-Turkish applicants, in breach of the 'standstill clause' (article 41) of the Additional Protocol of the Ankara Agreement.

(4) Ground (3) was that in reaching the Decision, the respondent had failed to apply the March 2018 Guidance, when rejecting the application on the basis that the applicant would not be 'bringing in money of his own' into the UK to establish his business. The Guidance accepted as legitimate funds which had been loaned. This was subject to certain provisos: that the source was legitimate, was under the business person's control, and could not be recalled at short-notice. The Decision erred in imposing the additional requirement of the earlier physical transfer of funds by the applicant to his brother-in-law, who in turn returned the money to him.

(5) Ground (4) was that the respondent should have granted the applicant an in-country right of appeal, and that the Court of Appeal's decision in SSHD v CA (Turkey) [2018] EWCA Civ 2875 was wrong. Permission to appeal in that case was being sought to the Supreme Court.

(6) In seeking permission, the applicant seeks orders quashing the respondent's original refusal of entry clearance and the Decision; and a mandatory order requiring that the respondent reconsiders both decisions.

Upper Tribunal permission

(7) On 1 May 2019, Upper Tribunal Judge Lindsley granted permission on the papers for the applicant's application to proceed, on grounds (1) to (3), but not on ground (4), on the basis that no appeal was made following the Court of Appeal's decision in SSHD v CA (Turkey).

The basis of the respondent's resistance to the orders sought

(8) The respondent served an Acknowledgment of Service on 15 February 2019 and detailed Grounds of Defence on 5 June 2019.

(9) In relation to ground (1), the respondent disputed that she had a general duty to follow up on certain matters for the purposes of clarification, explanation and elimination. In contrast, the onus was on the applicant to demonstrate that he met the requirements of the relevant immigration rules, for which there was a detailed guidance. Ground (1) essentially amounted to a mere disagreement with the conclusion reached by the respondent.

(10) In relation to ground (2), the March 2018 Guidance specifically confirmed at page [63] that experience and qualifications were not requirements of the ECAA rules. They should instead be taken into account as part of the overall assessment of the evidence provided. They were relevant to the overall assessment of an individual's ability to establish themselves in business. The assertion that they were requirements was not correct. The respondent concluded that the applicant was not genuinely intending to establish a business. She did so after considering a number of factors, including projected profits, likely competitors, and the lack of research and experience. That conclusion was open to her on the evidence before her and there was no error on public law grounds.

(11) In relation to ground (3), the respondent was entitled to take into account that the applicant had failed to provide any supporting documentation to show that he had been in possession of £16,000 at the time he allegedly transferred the money to his brother-in-law some years earlier. The respondent noted that the applicant had been unemployed for almost a year prior to making an application for entry clearance and had a bank balance of zero funds since March 2018. The respondent was, on the evidence before her, entitled to be satisfied that the alleged funds were not available to the applicant. Once again, the ground of challenge was merely a disagreement with the conclusion reached and there was no error on public law grounds.

(12) In relation to ground (4), on the question of challenge based on an in-country right of appeal, this had now been resolved by the case of CA (Turkey) referred to above.

Legal Framework

(13) Mr G Dingley confirmed at the beginning of the hearing that the applicant did not pursue ground (4).

(14) Paragraph [31] of HC509 (the Immigration Rules in force in 1973, which apply here) provides:

> *"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."*

(15) The relevant parts of the 'stand-still' provision (Article 41 of the Additional Protocol dated 1972 to the Ankara Agreement) provide as follows:-

> *"1. The contracting parties shall refrain from introducing between themselves any new restrictions on the freedom of establishing and the freedom to provide services."*

(16) Article 59 goes on to state:

> *"In the fields covered by this Protocol Turkey shall not receive more favourable treatment than that which Member States grant to one another pursuant to the Treaty establishing the Community."*

(17) The relevant passages of the respondent's March 2018 'ECCA business guidance' document, at pages [49] and [63], are as follows:

> *[49]*
> *"Evidence the funds or assets belong to the applicant*
>
> *This page tells you about what type of documents should be submitted to show that a person applying as a businessperson under the Turkish ECAA is devoting funds or assets of their own to the business which can be invested on*

a long-term basis.

While the 1973 rules do not specify the types of documents to be submitted in support of a business application, caseworkers should assess whether failure to provide relevant and/or requested documents undermines the credibility of the applicant's business proposal.

Evidence the funds or assets belong to the applicant

Applicants should be able to provide sufficient evidence to show that:
•the source of the funds is legitimate
•the funds are under their own control
•there is no possibility that the money may be recalled or withdrawn from the business at short notice.

They should provide evidence of the available funding. This should include original bank statements for the last 6 months. You may request a translation of those bank statements that are not in English as necessary. Additional evidence must be provided to show the source of any unusual or irregular deposits into the applicant's account, such as:
•transfers of funds from sources overseas
•assets from the sale of land, gold or property overseas
•gifts of money from business associates and close family members

You must convert money transfers from overseas into pounds sterling so they can be assessed. …
In all cases you must be satisfied enough evidence has been provided to show the money has been gifted by an individual who is financially able to make the gift, without the possibility of needing to recall the money at short notice.

Gifts from a business associate are not acceptable.

Applicants must show that the majority of funds to be invested are their own. Loans, either in the form of a business bank loan or from another source such as a family member, may form part of a funding package to set up in business but they must not be considered as assets belonging to the applicant.

If they rely in part on a loan, they must show their business will realistically make sufficient profit to be able to repay the loan as well as to support the applicant and any dependants. You must refuse applications where a loan forms the only basis of investment."

[63]
"Evidence of experience and qualifications

This page tells you about how a person's experience and qualifications can be used in part to assess their ability to establish in business or continue operating their business when applying as a businessperson under the Turkish

ECAA.

Experience and qualifications are not requirements of the 1973 business rules but should be taken into account as part of the overall assessment of the evidence provided.

You must examine this evidence in the context of the proposed business, taking into account the other supporting evidence provided. You must check the evidence is correct and genuine using CRS to check relevant information on previous visa applications.

In some circumstances, common sense will tell you it may be possible for the applicant to establish in business without relevant experience or qualifications. In other circumstances, a lack of previous experience and/or qualifications may be a barrier to establishing a business. For example, it could extend the time taken to establish the business and slow the rate of growth of the business in subsequent years.

All businesspersons are expected to show they have at least a basic understanding of business and financial management including cash-flow management.

All qualifications must be recognised in the UK and be acceptable for the purpose for which they are proposed. You must check the evidence is correct and genuine.

Evidence of specific qualifications needed in some trades will strengthen the credibility of the application, but it is the applicant's responsibility alone to make sure they meet any legal requirements. For example, self-employed workers in information technology (IT) trades and accountants may choose not to register with an appropriate professional body, even though this would strengthen the credibility of an application to establish in business."

The applicant's submissions

(18) The applicant referred to the well-known authority of R (Doody) v SSHD [1994] 1 AC 531 and in particular the sixth principle that a person is entitled to be informed of the gist of the case which he has to answer. The applicant had not been afforded the opportunity to make representations in response to the respondent's concerns about the business plan in advance of her refusal, in order to provide clarification on it. I was referred to the authorities of Anjum and Mushtaq. While they dealt with alternative aspects of the Immigration Rules, both dealt with the issue of genuineness and in Anjum's case also the question of funding. In Anjum's case there had been no further probing, clarification or exploring the areas of concern.

(19) In relation to ground (2), the applicant explained how the Guidance

was in breach of the Additional Protocol. The respondent had taken the March 2018 Guidance and applied it rigidly so that it became a set of rules, in breach of the Additional Protocol. One example was in relation to the applicant's business plan. The applicant could not have known that in producing the business plan, he would be required to explain the process by which he had carried out research into competitors, which was one criticism of the plan. In any event, the applicant had provided more information than required under the 1973 Immigration Rules. In doing so, it appeared he had been criticised for trying to be helpful.

(20) Referring to paragraph [97] of the Supreme Court decision of R (Alvi) v SSHD [2012] UKSC 33, the Supreme Court had encouraged a degree of certainty to reduce the scope of legal challenges and the key requirement in the Immigration Rules was that they should include all the provisions which set out the criteria, which maybe or are determinative of an application for leave to remain or enter. That was exactly the case which applied here, if for example, there was a specific requirement as to the format of business plans. There was no requirement for a particular level of qualification or experience in running a business in order to satisfy the genuineness of a business.

(21) In terms of ground (3) the applicant had provided both the receipt at page [110] of the applicant's bundle of the monies and also statutory declaration from his relative as to the applicant having originally sent money to him. The Guidance suggested that there had to be a legitimate source of funds, which were under the applicant's control. The Guidance did not stipulate the means by which he obtained those monies. Such a requirement was in breach of the Additional Protocol.

The respondent's submissions

(22) The two cases of Anjum and Mushtaq should be distinguished as they both dealt with interviews, where ambiguous questions or the record of those interviews was contested. In contrast, in this application, there was no interview. Despite his ECAA application having been rejected, including because of concerns about his business plan, the applicant had not made any additional submissions about the business plan. This was despite being allowed under the Upper Tribunal directions to adduce evidence if he wished, to address the respondent's concerns, whether in relation to sales figures or his financial sources. He claimed to have lacked an opportunity to put forward arguments that he would otherwise have done. He had not identified what those arguments were. This was not a case where there were very nuanced or unexpected points. It was incumbent on the applicant to say what he would otherwise have said and why it would have made a difference, otherwise the application for judicial review should not

succeed.

(23) In relation to ground (1) and the question of strict criteria being applied, neither the 2018 Guidance nor the Decision in the case suggested anything of the sort. In the Decision, the respondent had simply considered the evidence as a whole and explained why she was not satisfied. The specific explanation or rationale of the Decision had been misconstrued as the general application of strict criteria, which was not the case. By way of example, the respondent had concerns about the lack of analysis by the applicant of potential competitors in the local area. Not every business needed to conduct such analysis. However, the applicant was planning to run the business of a local corner shop. He had been out of work and until very recently had no funds. In this context, the respondent was entitled to consider the research that he had completed into competitors and the process by which he reached that. The onus was on the applicant to establish the genuineness of his business. It was a matter for the respondent's judgment in assessing the application and this was not a statutory appeal. The respondent had reached a properly reasoned decision.

Discussion

Ground (1) – duty of fairness

(24) As made clear in Doody and as the representatives agreed with me, the common law duty of fairness is fact-specific and depends very much on particular circumstances. The cases of Anjum and Mushtaq concerned interviews or records that were contested, unclear, or had not been properly considered. In such cases, it may be incumbent on the respondent to identify any areas of confusion prior to reaching a decision. This case concerned an application made with detailed paperwork, in response to provision of detailed guidance by the respondent. I accept the primary submission that the burden is on the applicant in cases such as this to satisfy the respondent as to the genuineness of the business arrangement.

(25) I also accepted the force of Mr Anderson's submission that the applicant has not identified precisely what submissions the applicant would otherwise have made, prior to the respondent reaching the Decision, which would have swayed that Decision. By way of example, the applicant has not explained what he would have said in relation to the lack of analysis around competitors, which weakened the credibility of the income projections and led the respondent to conclude that the applicant did not have the level of expertise that meant that the business was a genuine one. In the specific circumstances, the respondent was not under a duty to seek additional clarification or discuss further her areas of concern. The answer to the

core issue raised in Doody is that the applicant knew the requirements he had to meet when applying under the ECAA, and the details in the March 2018 Guidance provided him with assistance in doing so.

Ground (2) – the claim of additional criteria in breach of the Additional Protocol of the Ankara Agreement

(26) In relation to ground (2), I do not accept that the March 2018 Guidance constitutes additional formal criteria, or that the respondent treated them as such in assessing the applicant's application. The Guidance is explicit that whilst the 1973 rules do not specify types of documents to be submitted, the respondents' caseworkers should assess whether failure to provide relevant or requested documents undermines the credibility of a business proposal. Page [63] of the Guidance explicitly states that experience and qualifications are not requirements of the 1973 rules but should be taken into account as part of an overall assessment. The Guidance adds that in some circumstances, common sense will tell an assessor that it would be possible for an applicant to establish a business without relevant experience or qualifications. The respondent carried out her assessment of the applicant's application, considering all of the material provided in the round. I do not accept that in raising concerns about the applicant's business acumen, as demonstrated in his research into competitors, the respondent was imposing an additional strict rule. Rather the respondent was considering the applicant's situation overall, noting his apparent impecuniosity, the potential concerns around the business's income projections, and the limited research into local competitors.

(27) This was not a statutory appeal and the overall question is whether the respondent has properly turned her mind to the issues within the 1973 rules or has instead imposed additional requirements, in breach of the standstill provision of the Additional Protocol. I am satisfied that in reaching the Decision, the respondent did not treat the Guidance as a set of strict rules, which imposed a 'higher standard' than permitted for other EEA nationals. Rather the Guidance emphasises the need for a 'common-sense', holistic assessment on the narrow issue identified in the 1973 rules and states expressly that the examples by way of guidance given are just that - guidance, not requirements of the 1973 rules. I conclude that neither the Guidance nor the respondent's explanation for the Decision should be conflated to be viewed as the imposition of additional, higher standards, in breach of the Additional Protocol.

Ground (3) - alleged failure to apply the March 2018 Guidance in relation to the business investment

(28) The Guidance suggests that an applicant should be able to show that the funds intended for the business are legitimate, under their control, and there is no possibility that the money may be recalled or withdrawn from the business at short notice. I conclude that the respondent was entitled to consider the full circumstances of why the applicant was being paid monies by a relative, with which he invested in the business shortly before the application, i.e. the sum of £16,000. It raised the obvious question of whether the relative was investing in the business rather than the applicant himself. The source of funding was part of the wider concerns about the genuineness of the applicant's business. The respondent's rationale did not impose an additional requirement that the applicant should evidence the transfer of monies many years earlier to the relative. Rather, the respondent was concerned, as the applicant appeared to have no form of income immediately prior to his application. That was an analysis that the respondent was entitled to carry out and discloses no error of law on public law grounds.

Conclusions

(29) For the above reasons, I conclude that the Decision, and critically, the process by which the respondent reached the Decision, cannot be impugned on public law grounds. The respondent did not breach the common law duty of fairness. In considering the Guidance, the respondent did not impose a set of higher standards in breach of the Additional Protocol. Finally, the respondent did not ignore the Guidance when considering the source of the investment in the applicant's business.

Decision

(30) The application for judicial review is refused on all grounds.

J Keith

Signed: _____

Upper Tribunal Judge Keith

Dated: **8 August 2019**

UTIJR6

JR/268/2019

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

The Queen (on the application of Sevket Bozdag)

Applicant

v

Secretary of State for the Home Department

Respondent

Before Upper Tribunal Judge Keith

Upon judgment being handed down on 8 August 2019, neither counsel was in attendance.

It is ordered that

(1) The judicial review application is dismissed in accordance with the judgment attached.

(2) I order, therefore, that the judicial review application be dismissed.

Permission to appeal to the Court of Appeal

(3) The parties have not sought permission to appeal to the Court of Appeal. In any event, I refuse permission to appeal for the same reasons that I have refused the orders sought for judicial review.

Costs

(4) The applicant shall pay the respondent's reasonable costs, to be assessed if not agreed.

J Keith

Signed: _____

Upper Tribunal Judge Keith

Dated: **8 August 2019**

Applicant's solicitors:
Respondent's solicitors:
Home Office Ref:
Decision(s) sent to above parties on:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a question of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an applicant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).