



Neutral Citation Number: [2023] EWCA Civ 56

Case No: CA-2022-001025

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM The Upper Tribunal Asylum and Immigration Chamber
Mr Justice Robin Knowles
JR/974/2021

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 January 2023

Before :

LORD JUSTICE BEAN
LADY JUSTICE THIRLWALL
and
LADY JUSTICE NICOLA DAVIES

Between :

The King on The Application of Hasan Can Agca	<u>Appellant</u>
- and -	
The Secretary of State for the Home Department	<u>Respondent</u>

James Collins (instructed by **Kilic and Kilic Solicitors Ltd**) for the **Appellant**
Jack Holborn (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 17 January 2023

Approved Judgment

This judgment was handed down remotely at 10.00am on 31 January 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Nicola Davies:

1. In proceedings for judicial review the appellant challenges the respondent's decision to refuse the appellant leave to remain under the Agreement Creating An Association Between The Republic of Turkey and the European Economic Community ("the ECAA" also known as "the Ankara Agreement") and associated administrative review decisions. On 23 September 2021 Upper Tribunal Judge Kamara granted permission to apply. On 10 March 2022 Robin Knowles J ("the judge") refused the application for judicial review. Permission to appeal this decision was granted by Bean LJ on 8 August 2022.

Factual background

2. The appellant, born on 14 June 2002, is a national of Turkey. On 1 July 2020 he entered the UK on a multi-visit visa valid until 28 September 2020. On 7 September 2020 he applied for leave to remain under the ECAA in order to establish himself in business, his proposal involved the acquisition of an existing grocery shop and its development. On 1 March 2021 the respondent refused the application. The appellant applied for administrative review ("AR") which the respondent refused on 30 March 2021, and in so doing, amended the reasons for refusal. On 6 April 2021 the appellant applied for AR of the further decision which was refused on 4 May 2021.
3. The appellant's application was contained in a letter dated 8 October 2020 sent by solicitors acting on his behalf. It stated that the appellant was intending to buy an existing business namely an organic grocery store in the Highbury area of London. The funding of the purchase was met by £60,000 held in the appellant's bank account which had been gifted by his uncle in order to start up the business. Accompanying the letter were a number of documents which included the business plan, a draft contract, the lease of the shop together with financial statements and tax returns.
4. The business plan identified the range of foods to be provided, the sale strategy of the business was described as "straight forward". The appellant was described as "a young, energetic and enthusiastic businessperson" who "... will be responsible for management, staffing and daily operations as well as product ordering, stocking and bookkeeping." The personnel plan envisaged a staff of four; two cashiers and two produce staff. The financial plan included the profit and loss account and cash flow statements for years 1, 2 and 3.
5. In the decision dated 1 March 2021, the respondent refused the application and stated that: "No evidence has been provided to demonstrate that [the appellant] possesses any experience or qualifications to ensure the role can be carried out successfully". Additional concerns were identified relating to the "young age" of the appellant, the absence of the list of potential or existing clients, whether sufficient funds existed to cover the investment costs, whether the gifting letter from the appellant's uncle indicated that he did not want the return of the money and an issue relating to the existence of two companies both of which were linked to the business which the appellant was seeking to purchase.
6. In seeking AR of the respondent's first decision, the appellant's solicitor's letter stated:

“... there is no legal requirement that the applicant should have any experience or qualification to invest in a business. Any person with or without experience could invest in a business, as present here. It is unreasonable for the case worker to allege that such qualification/experience is necessary. The case worker has failed to understand that these are simple daily tasks in any business. It is general knowledge that anyone who is wishing to establish a business would know it theoretically and would easily adapt themselves in few weeks once they commence operating. The case worker failed to consider that every successful businessperson starts somewhere, should be given a chance and also there are many examples of successful businesses in the United Kingdom who are run by unqualified people in the United Kingdom. Hence the applicant wishes to purchase an existing successful business which the applicant just needs to adapt himself and get assistance from the staff if ever needed.

Mr Hasan Agca is a young, vibrant and hardworking individual who will bring unique ideas to his business and will hire skilled employees to support him. It is a simple commercial transaction who (sic) will be run by a young individual and it does not require that individual to possess any sort of qualification. There is no any (sic) course available that will teach you how to run a grocery shop. It is therefore unreasonable for the Home Office to make such allegation.”

7. The letter also addressed the issues raised as to funding, the nature of the uncle’s gift and explained the role of the two companies, one related to the proposed business and the other to the lease.
8. In the response dated 30 March 2021, the respondent removed the concerns raised as to the absence of potential clients and suppliers and the appellant’s age. As to the need for experience or qualifications the letter stated:

“Whilst you claim there is no legal requirement to have experience or qualifications to run a grocery store business and therefore unreasonable to highlight that such experience or qualification is needed. Experience and qualifications are taken into account as part of the overall assessment of the evidence provided. We do not consider it unreasonable to point out that you have no prior experience or qualification to run a grocery store or a business and whilst we acknowledge that you are a hardworking individual with unique ideas, this is not sufficient to run a business in accordance with the provision of the ECAA.

Furthermore, we acknowledge that you intent to hire staff to support yourself and also use the current staff for assistance however, this only further adds to the concern that you lack experience to run a grocery store and that you would require

additional support from existing and new staff. It is reasonable to expect that a person wishing to establish in a business to know the industry they are proposing to establish a business in. You have no prior experience in running a business and you appear to be reliant on existing staff to support you through your management and operational decisions and therefore we do not consider that you would meet the requirements set out in the relevant guidance.”

9. In refusing leave reliance was again placed on the issue of the gift from the appellant’s uncle and the two companies from whom the purchase was to be made.
10. The appellant’s solicitors sought AR of the 30 March 2021 decision. In essence, the same points were relied upon by the appellant, in respect of his business experience and qualifications.
11. The respondent’s decision letter dated 4 May 2021 maintained the refusal. Within it reference was made to the ECAA policy (business) guidance relating to evidence of experience and qualifications and mandatory qualifications. The letter stated:

“The ECAA policy guidance is clear in stating that all businesspersons are expected to show they have at least a basic understanding of business and financial management including cash-flow management. You have not provided sufficient evidence to demonstrate that you have an understanding of financial management and being able to effectively manage your finances, marketing, sales, customer service, communication and negotiation. You have also mentioned that you intend for the existing staff to mentor you, however you have not provided any experience of leadership skills, or understanding of the changing trends and demands in the industry. Although you claim there is not a course available that will teach you on how to run a grocery shop, no evidence has been provided of any transferrable skills that you may have. In addition, the policy guidance above also stresses the importance of having a mandatory professional qualification in business. Therefore, I do not agree with your claims that you meet the requirements set under the ECAA to establish in business.”

12. Reliance was also placed on the points previously raised by the respondent.

Proceedings for judicial review

13. At the hearing before Robin Knowles J in the Upper Tribunal, the appellant’s experience and the prospect of success of the business proposal were described as being “at the heart of the matter”. The respondent did not pursue any of the additional points previously taken. The judge noted at [12] that the appellant’s solicitors had from the outset stated that they would be pleased to provide any information if required.

14. The core of the judge's ruling is contained at [13] to [15] as follows:

“13. The decisive point is that looking at the matter through a common sense lens and in the round, the Secretary of State was entitled to hold and apply a concern in the context of this case about the absence of experience. The business plan did not address that with any sufficiency and did not acknowledge it as something that would require some further explanation if one was to be reassured that it did not leave the business plan at serious risk of not being achieved. Here, it really was for Mr Agca to explain.

14. A particular example is given by Mr Holborn about working capital provision. It is possible to countenance that there is a straightforward answer to that but the matter is not, as Mr Holborn indicates, explained or addressed. This does not feature as an individual point in the reasons and revised reasons from the Secretary of State but it should be taken as an example of why experience matter and why more was needed than was presented.

15. There are other ways of illustrating the same point. There is no sign of experience of managing staff which were to be part of the business. Again, although experience is not a prerequisite, when account is taken that it was absent here and not accompanied by anything like sufficient explanation as to why the business plan was intact without it, so in all the circumstances the ultimate decision in the round was one that the Secretary of State was entitled to reach.”

Grounds of Appeal

15. The grounds of appeal are:

- (i) the respondent's decision and the judge's endorsement of the decision elevates business experience into a prerequisite for the grant of an application. Such an approach is irrational and contrary to ECAA business guidance;
- (ii) in focusing on the appellant's lack of business experience the judge has failed to approach the application with the open textured consideration which was required.

Legal framework

16. The general aim of the ECAA, signed on 12 September 1963, was to promote economic relations between Turkey and the then European Economic Community. One means of so doing (Articles 13 and 14) was to introduce a process for abolishing the restrictions on the freedom of establishment and the freedom to provide services between the contracting parties. On 23 November 1970 the Brussels Protocol to the ECAA was signed (“the Brussels Protocol”), Article 41(1) of which prohibits the contracting parties from introducing between themselves new restrictions on the freedom of establishment and the freedom to provide services.

17. On 1 September 1973 upon its accession to the EEC, the UK became bound by the ECAA and the Brussels Protocol. Consequently, where a Turkish national sought to reside in the UK to establish him/herself in business or to provide a service, the UK had to apply the domestic business provisions as contained in the Immigration Rules in force in 1973. For after-entry applications, the Statement of Immigration Rules for Control after Entry (23 October 1973) (“HC510”) sets out the substantive framework.
18. Paragraph 21 of HC510 is relevant to applications by Turkish nationals admitted as visitors who apply for leave to remain to establish in business. It states:

“People admitted as visitors may apply for the consent of the Secretary of State to their establishing themselves here for the purpose of setting up in business, whether on their own account or as partners in a new or existing business. Any such application is to be considered on merits. Permission will depend on a number of factors, including evidence that the applicant will be devoting assets of his own to the business, proportional to his interest in it, that he will be able to bear his share of any liabilities the business may incur, and that his share of its profits will be sufficient to support him and any dependants. The applicant’s part in the business must not amount to disguised employment, and it must be clear that he will not have to supplement his business activities by employment for which a work permit is required. Where the applicant intends to join an existing business, accounts should be produced to establish its financial position, together with a written statement of the terms on which he is to enter into it; evidence should be sought that he will be actively concerned with its running and that there is a genuine need for his services and investment. Where the application is granted, the applicant’s stay may be extended for a period of up to 12 months, on a condition restricting his freedom to take employment. A person admitted as a businessman in the first instance may be granted an appropriate extension of stay if the conditions set out above are still satisfied at the end of the period for which he was admitted initially.”

19. At the relevant time the respondent’s guidance on the interpretation of HC510 was contained in the ECAA business guidance (v10.0) (“ECAA BG”). The relevant provisions state:

“Evidence of experience and qualifications

.....

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.

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Mandatory qualifications

Where an applicant is wishing to start a business it may not be possible for them to have acquired all the qualifications/licences they require in advance. In such circumstances, they should submit evidence that they have researched what is required and plan to obtain them in due course. Where the applicant is already running a business, you must see any mandatory professional qualifications before you make a decision on a case.

....

Insufficient evidence

In cases where the applicant does not provide sufficient evidence of their previous experience and/or qualifications relevant to the application, you should ask them to provide further written evidence. This may take the form of employer references and certificates.”

20. In *Re: EK (Ankara Agreement: 1972 Rules: Construction: Turkey) [2010] UKUT 425 (IAC)* at [23] the Upper Tribunal stated: “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... The Ankara Agreement precludes the introduction of either stricter Rules or a stricter practice in the administration of the Rules.”
21. As to the nature of an application under the ECAA, the associated procedural requirements and the role of the court, Saini J in *R (Karagul) v SSHD [2019] EWHC 3208 (Admin)* at [106] stated:
 - “(i) The assessment of an application under paragraph 21 of HC510 is a merits based evaluative assessment for the

Secretary of State's judgment. Notably, it is an assessment involving a predictive analysis of the viability in the future of a proposed business, and such an assessment will be by its very nature difficult to challenge.

(ii) As long as the Secretary of State has followed a fair procedure, directed herself according to relevant considerations (and not taken into account irrelevant considerations), and arrived at a rational conclusion with reasons (directed at the terms of HC510 and the Guidance), a public law court will not interfere with the decision.

(iii) The context in which the evaluative assessments are to be undertaken by the Secretary of State gives her a wide margin of appreciation as to the merits and feasibility of proposed businesses and whether they meet the paragraph 21 requirements. Specifically, it would be in a rare and extreme case that a court on judicial review would second-guess an overall assessment by the Secretary of State that an application failed on the merits.

....

(v) The factors which the Secretary of State will take into account in considering an application are fairly and fully set out in the terms of paragraph 21 of HC510 and the Guidance. No further elaboration is required. The applicant knows of the requirements he or she needs to satisfy in the application.

(vi) It is for an applicant to make his or her application addressing the publicised factors and supplying evidence including business plans and the additional material set out in the Guidance. Although the 1973 Rules did not specify any particular materials had to be provided, the nature and type of information which the Secretary of State requires in her Guidance is justified and rationally related to the fair consideration of an application. It is lawful for the Secretary of State to require an applicant to supply such information.

(vii) Subject to what is said in the Guidance, if an applicant fails to provide compliant information there is no obligation on the Secretary of State to contact the applicant to alert him or her that certain material is missing. They have had fair warning of what was required.”

Submissions of the appellant and the respondent

22. The court is grateful to counsel, Mr Collins on behalf of the appellant and Mr Holborn on behalf of the respondent, for their clear and succinct submissions.

23. The appellant contends that experience and qualifications are not requirements of the 1973 Rules. They should be taken into account as part of the overall assessment of the evidence and viewed in the context of the proposed business, in this case an existing and profitable local grocery shop. An open textured approach is required which includes the application of common sense. It is accepted that the appellant provided no evidence of business experience nor of a basic understanding of business and financial management: however, the business is not complex and the sales strategy is straight-forward. It is the appellant's case that the owner of the business does not require previous experience, further, there is no course available which would teach an individual how to run a grocery shop. Had more evidence been required, it could have been sought from the appellant's solicitors who indicated their willingness to provide further information from the outset.
24. The respondent contends that, although business experience was not a prerequisite, its absence was a decisive point in this application. It was decisive as it went to the heart of the issue of whether or not the business was viable. This was identified by the judge at [13] - [15] of his judgment. The original refusal of the respondent and the reasoning contained within the two ARs are to be considered "in the round". They represent an open textured exercise which focused on the critical issue of whether a viable business could be established by the appellant. The respondent concluded that upon the material provided there was no evidence to show that the appellant could establish such a business. Accordingly, the respondent's decision to refuse leave was a rational one and was properly upheld by the judge.

Discussion

25. At the core of the hearing before Robin Knowles J was one issue namely whether the appellant possessed the necessary business experience to ensure that the grocery shop which he was intending to acquire would remain a viable business under his ownership. The relevance of an individual's business experience when making an application as a businessperson under the ECAA is set out in the ECAA BG. It is accepted that experience and qualifications are not requirements of the 1973 Rules but they are relevant and account should be taken of them as part of the overall assessment of the evidence provided by an applicant. That evidence has to be examined in the context of the proposed business. In some circumstances common sense will indicate that it is possible for an applicant to establish a business without relevant experience or qualifications but all businesspersons are expected to show they have at least a basic understanding of business and financial management including cash-management.
26. The difficulty for this appellant is that he provided no evidence of any relevant business experience nor of any understanding of business and financial management. No issue was taken with his solicitor's description of the appellant as being: "young, vibrant and hardworking". The essence of the appellant's case in respect of business experience, was that as this was a straightforward exercise, no experience was required to in respect of the duties of owning and running a grocery shop.
27. From the first refusal (1 March 2021), the respondent relied upon the appellant's lack of business experience as a relevant factor leading to the refusal of leave. In the revised decision made on 30 March 2021, the respondent addressed the issues of the appellant's business experience (para 8 above) and also referenced the business plan

which states that: “Mr Agca will be responsible for management, staffing and daily operations as well as product ordering, stocking and bookkeeping... besides Mr Agca, [the shop] will have a staff of four: two cashiers and two produce staff”. The respondent stated that no evidence had been provided to demonstrate that the appellant possessed any experience or qualifications to ensure the role could be carried out successfully.

28. In the final review decision dated 4 May 2021, the respondent again addressed the absence of relevant evidence relating to the appellant’s understanding of business and financial management (para 11 above). Further, what the reasoning of the respondent highlights is the need for evidence relating to the practical day to day running of such a business in terms of finance, stock, sales, customer service and staff. This was an evaluative assessment which was directly relevant to the future viability of the business.
29. In my view, the appellant and his solicitors could have been in no doubt of the respondent’s concern as to the absence of evidence of the appellant’s business experience and of the fact that account was taken of it in the respondent’s original decision to refuse leave and the subsequent AR decisions.
30. What is clear from the guidance contained in the ECAA BG, the respondent’s original refusal decision and the subsequent AR decisions is that evidence relating to the business experience of the appellant was required and was absent. It is no answer for the appellant to say it could have been sought, the need for it had been identified.
31. In refusing the application for judicial review, the judge at [13] identified the absence of the appellant’s business experience as the “decisive point”. It was an issue of which account had been properly taken by the respondent and it was decisive as it went to the question of whether the business would be viable under the ownership of the appellant. I do not regard the fact that the point was decisive as elevating its importance to that of a prerequisite.
32. I am satisfied that the appellant and those advising him were on notice of the need for evidence of his business experience. Notwithstanding the relatively small nature of the proposed business, it is not difficult to understand such a requirement as it relates to the finances, sales and stock of the business and of managing staff. The experience of the owner of such a business was also relevant as to its future viability and any development. In the absence of such evidence from the appellant, and of an explanation as to why the business plan was effective without such evidence, the decision of the respondent was reasoned and rational. It was open textured in the sense that it considered the various aspects of the future running of the business and what would be required of the appellant as owner. In considering the refusal decisions of the respondent, the findings of the judge were reasoned, relevant and fair.
33. Accordingly, for the reasons given and subject to the views of Bean LJ and Thirlwall LJ, this appeal is dismissed.

Lady Justice Thirwall:

34. I agree.

Lord Justice Bean:

35. I also agree.