Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/17707/2018
HU/17795/2018
HU/17800/2018

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre	**Decision & Reasons Promulgated**
On 16 May 2019	**On 13 June 2019**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

PASA [S]
SULTAN [S]
[NS]

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Ms E Daykin instructed by Direct Access
For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The first appellant is a citizen of Turkey who was born on 1 September 1975. The second and third appellants are his wife and daughter, who are also citizens of Turkey, and were born on 1 January 1980 and 10 October 2017 respectively.

2. The first appellant came to the UK and remained as a visitor between 1998 and 2008. In 2008, he applied for leave as a Turkish business person under the Turkey–European Community Association Agreement ("the Ankara Agreement")). It would appear that, after some delay, he was granted leave to remain for a year in 2013 and that was subsequently extended until 10 May 2017. As a business, the first appellant runs a pizza kebab shop.

3. The second appellant came to the UK as the first appellant's spouse on 13 September 2015 and has remained, it would appear, in the UK with leave as his dependant since that time. The third appellant was born in the UK on 10 October 2017.

4. On 8 May 2017, the first appellant applied for indefinite leave to remain (ILR) relying, again on the Ankara Agreement, on the basis that he had been carrying on his business in the UK for a period of at least four years. The second appellant was a dependant upon that application and, after her birth, the third appellant was added as a dependant.

5. On 13 August 2018, the Secretary of State refused the first appellant's application for ILR and also refused to grant ILR to the second and third appellants as his dependants.

6. In reaching those decisions, the Secretary of State applied the Immigration Rules in force as at 1 January 1973, namely *Statement of Immigration Rules for Control after Entry* (23 October 1972), HC 510, as required by the 'standstill' clause in the Ankara Agreement.

7. The basis of the refusal was para 4 of HC 510 and, in particular, taking into account the factors set out in para 4:

> "Whether in the light of his character, conduct of associations it is undesirable to permit him to remain; ..."

8. The Secretary of State relied upon two matters. First, on 28 March 2018 the first appellant had been convicted at the Bristol Crown Court of an offence under the Regulatory Reform (Fire Safety) Order 2005 namely that as the "responsible person" for his business premises he had:

> "fail[ed] to comply with any requirement or prohibition imposed by articles 8 to 22 and 38 (fire safety duties) where that failure places one or more relevant persons at risk of death or serious injury in case of fire". (art 32(1)(a))

9. Having been convicted, he was sentenced to a period of twelve months' imprisonment which was suspended for 24 months. He was ordered to pay a victim surcharge of £140 and costs of £4,772.49.

10. Secondly, the Secretary of State relied upon the underpayment of tax and national insurance contributions by the first appellant.

11. In the light of both these matters, but in particular the criminal conviction, the Secretary of State was not prepared to exercise discretion to grant the appellant's application in the light of his conduct and character.

12. The first appellant sought an Administrative Review. That review was, however, rejected on 19 September 2018.

The Appeal to the First-tier Tribunal

13. The appellants' appealed to the First-tier Tribunal. The appeal was heard by Judge C J Woolley on 15 January 2019. It was accepted before Judge Woolley that the appellants could not appeal against the decision to refuse them leave under HC 510 on the basis of the Ankara Agreement. That followed from the decision of the Court of Appeal in SSHD v CA (Turkey) [2018] EWCA Civ 2875. Judge Woolley, however, concluded that there was a valid appeal before him because the Secretary of State's decision was, properly understood, a decision to refuse the appellants' human rights claims which were appealable under s.82(1)(b) of the Nationality, Immigration and Asylum Act 2002 (the "NIA Act 2002").

14. Consequently, it was common ground before Judge Woolley that the appellants' appeals were on the basis that the decision to refuse them leave breached Art 8 of the ECHR. It was also common ground before Judge Woolley that, in reaching a conclusion in respect of that, it was relevant to determine whether the appellants could succeed under the applicable Immigration Rules including, in the case of the first appellant, HC 510. The only other relevant rule was para 276ADE of the Immigration Rules (HC 395 as amended).

15. Judge Woolley concluded that the Secretary of State's decisions did not breach Article 8 of the ECHR. In reaching that conclusion, Judge Woolley found that, on the basis of the first appellant's conviction, he could not succeed under HC 510 as a Turkish business person because on the basis of his character and conduct it was "undesirable to permit him to remain". Judge Woolley did not base his finding on the fact, earlier relied upon by the Secretary of State, that the appellant had underpaid tax as Judge Woolley accepted that that had now been remedied by repayment.

16. The appellant sought, and was granted, permission to appeal to the Upper Tribunal by the First-tier Tribunal (Judge O'Garro) on 21 February 2019.

17. On 25 March 2019, the Secretary of State filed a rule 24 response seeking to uphold the judge's decision.

The Submissions

18. On behalf of the appellants, Ms Daykin relied upon the grounds of appeal. Those grounds raise, in essence, three points. In her oral submissions, she focused upon the first two points.

19. First, she submitted that the judge in concluding that para 4 of HC 510 applied because of the first appellant's conviction of the strict liability offence, had failed to adopt 'a nuanced' approach, in that the judge had failed to take into account the first appellant's explanation, set out in his witness statement dated 11 January 2019 particularly at para 6. She submitted that at para 42(vii), the judge had failed to take into account the first appellant's explanation that he was liable for the strict liability offence as the "responsible person" for his business premises but that the offence, which involved an employee staying in the room above his premises, unbeknown to him.

20. Secondly, Ms Daykin submitted (at least initially) that the judge had failed in para 44 of his determination properly to consider whether, in the light of the nature of the offending, a "lesser measure" than a refusal of ILR was available, namely a further grant of limited leave. That, she submitted, was open to the Secretary of State under his policy when considering Ankara Agreement applications for ILR.

21. Thirdly, although this was not directly raised in Ms Daykin's oral submissions, the grounds contend that the judge reached inconsistent findings in para 43(ii) and para 43(v). In the former, he had accepted that the appellants were "financially independent" and that there was "no evidence that any of them are dependent on the State" for the purposes of s.117B(3) of the NIA Act 2002. However in the latter, the judge had found that the appellants would "represent a significant economic burden on the country in terms of the provision of housing and healthcare".

22. On behalf of the Secretary of State Mr Howells relied upon the rule 24 response.

23. As regards the first ground, Mr Howells submitted that in para 43(vii) the judge had fully considered the circumstances of the first appellant's offending and had properly come to the conclusion that para 4 of HC 510 applied.

24. As regards the second ground, Mr Howells submitted that, as the judge had found that para 4 applied, he was entitled to conclude that in the light of the first appellant's conviction it was "undesirable to permit him to remain"; namely that he should be granted *any* leave to remain.

25. Mr Howells did not refer to the third ground which, as I have said, was not addressed in Ms Daykin's oral submissions.

Discussion

26. Apart from ground 3, the scope of the appellants' appeals is that the judge erred in law in reaching his finding that the first appellant could not succeed under HC 510 because para 4 of those Rules applied on the basis of his criminal conviction in 2018. As a result, and given the judge's unchallenged finding in para 31 that the appellants could not succeed under para 276ADE, their appeals turned upon an application of Art 8 outside the Rules.

27. As I have already indicated, it is common ground that as a Turkish business person the first appellant's application (and those of the other appellants as his dependants) turned upon an application of the relevant Rules in HC 510.

28. Paragraph 28 of HC 510 provides as follows:

> "A person who is admitted in the first instance for a limited period and who has remained here for four years in approved employment or as a businessman or a self-employed person or as a person of independent means may have a time limit on his stay removed unless there are grounds for maintaining it. Applications for the removal of the time limit are to be considered in the light of all the relevant circumstances including those set out in para 4..."

29. That was the provision upon which the first appellant relied, seeking removal of the time limit upon his leave (and that of his dependants) such that they would each have indefinite leave to remain.

30. Paragraph 4 of HC 510 provides as follows:

> "The succeeding paragraphs set out the main categories of people who may be given limited leave to enter and who may seek variation of their leave, and the principles to be followed in dealing with their applications, or in initiating any variation of their leave. In deciding these matters account is to be taken of all the relevant facts; the fact that the applicant satisfies the formal requirements of these Rules for stay, or further stay, in the proposed capacity is not conclusive in his favour. It will, for example, be relevant whether the person has observed the time limit and conditions subject to which he was admitted; whether in the light of his character, conduct of associations it is undesirable to permit him to remain; whether he represents a danger to national security; or whether, if allowed to remain for the period to which he wishes to stay, he might not be returnable to another country." (My emphasis).

31. It is clear from reading para 28, together with para 4, that the decision maker (here the judge) was required to take into account all the circumstances. Paragraph 4 is, itself, a discretionary ground of refusal.

32. In these appeals, it was not suggested that the first appellant did not satisfy the "formal requirements" for leave as a Turkish business person (see para [21] of the determination). The sole basis upon which the judge found, and which was the basis for the argument before him, that the appellant could not succeed under HC 510 was because the discretionary provision in para 4 applied to him.

33. Judge Woolley dealt with para 4 at a number of points in his determination.

34. At para [32] he stated under the heading "global conclusion on HC 510 and paragraph 276ADE":

> "I therefore find that the appellants do not qualify for leave under HC 510 or under paragraph 276ADE. I have reached this decision on the basis of all the evidence in this appeal."

35. In the grounds it is asserted that in para 32, the judge failed to give any reason why the appellants did not qualify for leave under HC 510. Ms Daykin did not pursue this point in her oral submissions. She was correct not to do so since it is plain that the judge was simply stating his conclusion in para 32 and that his reasons for that conclusion were given in para 43(vii) and which, in oral submissions, Ms Daykin focused upon. There, the judge said this:

> "vii) Whether HC510 could be met
>
> I recognise that HC510 involves a broad exercise of discretion, and that the criminal conviction was the first committed by the appellant. As to its being an offence of strict liability I find that this is no mitigation: it is an offence of strict liability for good reason as the appellant was the responsible person under the Regulations and they are designed to prevent death by fire. The appellant is in business which involves the running of premises to which members of the public may have access, and the fact that he has a conviction under the Regulations does come within the wording of HC510 as "character" and "conduct" that should be taken into account. The fact that a prison sentence was imposed, albeit suspended, shows how seriously the court treated the offence. The court could have simply imposed a fine. I find that, had I been deciding the appeal under HC510, that the conviction would have meant that it was undesirable to permit him to remain because of his character and conduct. In terms of the proportionality exercise this is therefore a factor against him."

36. Ms Daykin placed reliance upon the Upper Tribunal's decision in R (Temiz) v SSHD IJR [2016] UKUT 26 (IAC) (UTJ Grubb) where, in quashing a decision of the Secretary of State refusing the applicant leave to remain under the Ankara Agreement, on the basis that the Secretary of State had not adopted "a nuanced approach" to para 4, I said this (at [36]):

> "In her decision, by simply asserting that the applicant had overstayed albeit for some length of time, the respondent failed to take into account this context relevant to the application as one of "all the circumstances" she was required to consider under para 4 and in accordance with her own policy guidance. The approach to his discretion had to accommodate a more nuanced approach than a simple assertion of unlawful presence. In that regard also, the respondent acted unlawfully and her decision to refuse the applicant leave is flawed."

37. The "unnuanced" approach of the Secretary of State in Temiz was that para 4 was applied simply on the basis that the applicant had overstayed in the UK. No account had been taken of the circumstances during that time, for example, that he had not worked and/or built up his business whilst unlawfully in the UK (see [35] of Temiz).

38. I do not accept Ms Daykin's submission that in para 43(vii) Judge Woolley adopted a similar, and unlawful, "unnuanced" approach to the first appellant's offending. In para 43(vii), the judge specifically referred to the first appellant's offending and the seriousness of it based upon the imposition of a custodial sentence, albeit one that was suspended. I do not accept Ms Daykin's submission that Judge Woolley failed to have in mind the circumstances of that offence as a result of which the first appellant was, nevertheless, guilty of that offence on a 'strict liability' basis. Ms

Daykin relied upon the first appellant's explanation of his offending in his witness statement. In particular, it is set out as paras 6-8 as follows:

> "6. I now wish to explain the circumstances of my conviction. I run a takeaway business called [~] from [~ Bath]. I took over this business in 2015 having previously run a takeaway called [~] at [~ Midsomer Norton]. I lease my current business premises which includes a single room above the shop, which one of my employees, [G], was staying in. The local authority inspected the premises and informed me that no-one should be living above the shop because it needed a fire escape and gave me a warning. I asked the employee not to stay there anymore and he moved in with a lady friend. The inspector returned a month later and said everything was okay and left. Unbeknown to me my employee had an argument with the lady friend he was staying with and stayed above the shop again and was seen by the inspector. I was interviewed by the fire brigade and I was charged with the offence because as the leaseholder and business owner and employer I am the responsible person under the law. The Magistrates transferred my case to the Crown Court.
>
> 7. I pleaded guilty to the offence at the Crown Court after my barrister informed me that I am the responsible person and therefore I should plead guilty. My employee gave a statement to confirm that I did not know he had returned to the premises. I dismissed my employee as a result of his conduct.
>
> 8. I am paying the costs of the criminal case by instalment and am keeping up with those every month. I also had to pay my own legal costs privately. I have also since sought planning permission to instalment a fire escape and I am just waiting for approval from the council."

39. True it is that the judge does not specifically refer to that evidence in para 43(vii) of his decision. However, his decision must be read, sensibly, as a whole. As paras 18-23 of his determination, Judge Woolly set out Ms Daykin's submissions on behalf of the appellants before him. At para 22 Judge Woolley set out her submission as follows:

> "In respect of the conviction there is little information provided by the respondent – all the respondent refers to is the fact of conviction and nothing is given of the facts. There is no basis for the respondent to conclude that it was a "clear and conscious" act. Ms Daykin invited me to look at the Fire Safety Regulations where the key provisions are set out at para 7. The appellant explains the circumstances of the conviction and in the absence of any other material she invited me to find that these were the circumstances. There was absolute liability under the criminal law even though an employee did the act. The appellant has no previous convictions and has complied with the terms of the sentence. The prison term was wholly suspended and a costs payment plan has been put in place and he is complying with it. There is a very broad exercise of discretion permitted and it is wrong to treat this as a mandatory reason for refusal. There is no evidence of the consideration of the circumstances and this

> was a strict liability offence. To look at this otherwise would not be in accordance with the law."

40. Ms Daykin specifically relied upon the circumstances of the offending as a basis for inviting the judge to find that para 4 of HC510 did not apply. Reading the judge's determination as a whole, as must be the case, it is plain that in reaching his conclusion at para 43(vii) he had well in mind her submissions which included her submission that the circumstances surrounding the offending, its strict liability nature and how he had come to be in breach of the law, were relevant in determining whether para 4 applied. I am satisfied that he had all the circumstances in mind when he reached his finding on para 4.

41. Ms Daykin did not raise a challenge based upon the irrationality of his finding but rather simply that he had failed to consider all the circumstances of the first appellant's offending and thereby had adopted an "unnuanced" approach to para 4. In my judgment, the judge clearly did take into account all the relevant circumstances and I see no basis upon which his finding in para 43(vii) can be said to be unsustainable in law.

42. Turning now to Ms Daykin's second ground, this is directed towards the judge's reasoning in para 44 of his determination which is in the following terms:

> "Answering the questions put in **Agyarko** and **Hesham Ali** I find that the objective of the measure (namely the refusal of further leave to the appellants in the interests of legitimate immigration control) is sufficiently important to justify the limitation of any private and family life rights of the appellants, and that the measure of refusing their application is rationally connected to the objective of legitimate immigration control in the economic interests of the UK. I find that a lesser measure could not have been used as there was full consideration under HC510 in both the decision and administrative review, and the appellant was found not to meet the requirements for further leave – there would have been no reason to grant a further period of limited leave in these circumstances. I find that the importance of legitimate immigration control outweighs the rights of the appellants which I have summarised above. Applying the balance sheet approach it is clear that the countervailing factors do not outweigh the importance attached to the principle of legitimate immigration control. The first appellant may face some difficulties on return to Turkey after being in the UK for ten years, as may the second and third appellants after living in the UK for a lesser period, but the fact that this is so does not mean that their Article 8 rights are thereby being breached. The appellants have not produced a very compelling case so as to outweigh the public interest in removal."

43. Ms Daykin's submission is that the judge has failed to consider that, even if the first appellant could not succeed under HC510 in obtaining ILR, given the nature of his offending it would be open to the Secretary of State to make a grant of further limited leave and that the judge should have considered that in applying HC510.

44. It was accepted before me that, in certain circumstances, a grant of a further period of limited leave was possible even though the application was for ILR under HC510.

45. The difficulty with Ms Daykin's submission is, however, that the judge found that para 4 applied such that that, by its own terms, in the light of the first appellant's character and conduct it was "undesirable to permit him to remain". As it was undesirable to "permit him to remain", there was no basis for the grant of *any* leave, including a further period of limited leave. As I have concluded that the judge's finding in respect of para 4 of HC510 is legally unassailable, it inevitably follows, as Judge Woolley himself recognised in para 44 of his determination, that there would be "no reason to grant a further period of limited leave".

46. Consequently, I reject the appellants' second ground of challenge.

47. Turning, then, finally to the third ground, this was not specifically raised in the oral submissions. There is, of course, no necessary inconsistency in the judge finding, for the purposes of s.117B(2) that the appellants are "financially independent" but that nevertheless, they will be an economic burden on the healthcare system as they would be obtaining free NHS healthcare. Whilst it may not be immediately obvious why, if they are financially independent, they will remain an economic burden on the UK in respect of the "provision of housing", any inconsistency is not, in my judgment, material to the judge's finding that the appellants have failed to establish that the refusal of leave breaches Art 8 outside the Rules on the basis that the decisions are disproportionate. The judge clearly took into account a range of factors "acting against the appellants" and "in favour of the appellants" at para 43. His conclusion at paras 44-45 that the decisions were not disproportionate, given that the appellants could not succeed under any relevant Immigration Rules and that despite "some difficulties" it was reasonable to expect them to return to Turkey to live, was rationally open to the judge. Indeed, his conclusion was inevitable.

48. For these reasons, I reject the appellants' grounds of challenge. The judge did not materially err in law in dismissing the appellants' appeals under Article 8 of the ECHR.

Decision

49. Accordingly, the decision of the First-tier Tribunal to dismiss the appellants' appeals under Art 8 did not involve the making of a material error of law. The judge's decision, therefore, stands.

50. Accordingly, the appellants' appeals to the Upper Tribunal are dismissed.

Signed

A Grubb
Judge of the Upper Tribunal

11 June 2019

TO THE RESPONDENT
FEE AWARD

Judge Woolley, having dismissed the appeals, made no fee award and that decision stands.

Signed

A Grubb
Judge of the Upper Tribunal

11 June 2019