



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/42072/2013

**THE IMMIGRATION ACTS**

Heard at Field House  
On 4 June 2014

Determination promulgated  
On 7 August 2014

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

**Mehmet Incefidan**  
(Anonymity direction not made)

**Appellant**

and

Secretary of State for the Home Department

**Respondent**

**Representation**

For the Appellant: Ms. P. Solanki of Counsel instructed by Garth Coates.

For the Respondent: Mr. S. Kandola, Home Office Presenting Officer.

**DETERMINATION AND REASONS: ERROR OF LAW**

1. This is an appeal against the decision of First-tier Tribunal Judge Obhi promulgated on 5 February 2014, dismissing the Appellant's appeal against the Respondent's decision dated 2 October 2013 to refuse to vary leave to remain in the UK for the Appellant to establish himself in business under the Turkey - European Community Association Agreement, and to remove him from the UK pursuant to section 47 of the Immigration, Asylum and Nationality Act 2006.

## **Background**

2. The Appellant is a national of Turkey born on 15 November 1985. His immigration history is summarised in the cover sheet to the Respondent's bundle before the First-tier Tribunal, and also at paragraph 1 of the determination of the First-tier Tribunal Judge: it is unnecessary to repeat it here. On 19 July 2013 the Appellant made an application for leave to remain in order to establish himself in business under the Turkey - European Community Association Agreement on the basis of his proposed business providing IT services.
3. The Appellant's application was refused for reasons set out in a 'reasons for refusal' letter dated 2 October 2013, and a Notice of Immigration Decision was issued accordingly bearing the same date and served on 4 October 2013.
4. The Appellant appealed to the IAC. His appeal was dealt with 'on the papers' - i.e. without a hearing. The First-tier Tribunal Judge dismissed the Appellant's appeal for reasons set out in her determination.
5. The Appellant sought permission to appeal which was initially refused by First-tier Tribunal Judge Reed on 28 February 2014, but subsequently granted by Upper Tribunal Judge Eshun on 16 April 2014.
6. The Respondent has filed a Rule 24 response dated 10 May 2014 resisting the appeal. The Appellant in turn has filed a Rule 25 reply dated 19 May 2014.

## **Error of Law**

7. The First-tier Tribunal Judge was satisfied that the Appellant was suitably qualified and had the ability to provide the services which he had outlined in his business plan in support of his application: however, the Judge was "*concerned*" that the business plan was unrealistic. The Judge indicated her concerns in respect of projected income, and the provision for the payment of living expenses.
8. In this latter regard Mr Kandola in due course accepted that the Judge appeared to have proceeded on the basis of a factual misconception.

Ms Solanki highlighted the cash flow forecast contained within the business plan as including a monthly figure of £1200 under the heading 'Drawings'. She explained that this was a reference to the drawing of funds from the business to meet the personal living expenses of the Appellant.

9. It is perhaps understandable in circumstances where this was an appeal dealt with 'on the papers' that the Judge had not appreciated the meaning of this particular item. Nonetheless, where there is a fundamental misconception of fact – even without blame attaching to the decision-maker – it is capable of amounting to an error of law.
10. The Judge plainly placed particular reliance upon the apparent lack of *"provision for the payment of [the appellant's] living expenses, such as the rent that he will pay, and the basic amount is that he will have to withdraw from the business in order to sustain himself"* (paragraph 13), because she went on to state *"To that extent the business plan is unrealistic. It may be said that the appellant will rely on his savings to feed, clothe and accommodate himself, but if that is the case, then the amounts to be used from his savings should be clearly stated within the business plan"* (also paragraph 13). As now identified, the amounts that the Appellant proposed to use – not from his savings, but from the monies generated by his business – were stated within the business plan and budgeted accordingly.
11. In such circumstances I am satisfied that the misconception of fact amounted to an error of law.
12. As regards the Judge's 'concerns' over the Appellant's projected income, I find that the determination is unclear as to exactly what evidence the Judge had taken into account, or how she has reconciled the available evidence with her conclusions. The Judge identifies the specification of hourly and daily rates provided by the Appellant, but states *"there is inadequate information in the business plan as to how he will generate the fees"* (paragraph 13); see similarly at paragraph 14 - *"There is not a proper assessment contained within the business plan of how much he can realistically earn from the business"*, to which the Judge adds that there is no evidence of the research undertaken as to the rate of remuneration for the work proposed.
13. There is no apparent dispute as to what the Appellant was proposing to do by way of business, and further the Judge accepted his ability to

provide the proposed IT services. The Appellant in his business plan under the heading 'Market Research' outlined his view as to the need for such services, which he cross-referenced to source documents. Moreover, in the Appellant's bundle before the First-tier Tribunal at pages 108–135 the Appellant included evidence of: the demand for staff in IT and computing; the demand for persons working in technology in particular in the London region; programmers and software development professionals being included on the Respondent Tier 2 Shortage Occupation list; and examples of hourly rates and salaries of persons working in the software/technology sector. Whilst on the face of it some of this evidence does not appear to correlate exactly with the type of services the Appellant was proposing to supply, there is an absence of any proper consideration by the First-tier Tribunal Judge of this supporting evidence, or any attempt to reconcile it with her adversely determinative assessment of the Appellant's projected income.

14. In all such circumstances I consider that the misconception of fact referred to above, together with the absence of reasons in respect of the supporting evidence, is such that the determination of the First-tier Tribunal requires to be set aside for error of law.

### **Re-making the Decision**

15. I initially considered that it would be possible to remake the decision in the appeal without remitting to the First-tier Tribunal, notwithstanding that the Appellant had not hitherto had an oral hearing of his appeal. However, upon embarking on hearing evidence from the Appellant it very quickly became apparent that he was struggling to explain in English some of the technicalities of his business. In circumstances where it was therefore necessary to adjourn the appeal for the provision of an interpreter, and again bearing in mind that there has not hitherto been an oral hearing of the appeal, and with the agreement of both representatives, I determined that the appeal should be remitted to the First-tier Tribunal for a fresh hearing with all issues at large.
16. It is unnecessary to make any particular Directions save that the Appellant's bundle should be re-served on the Respondent, Mr Kandola informing me that there did not appear to be a copy on the Respondent's file.

## **Decision**

17. The decision of the First-tier Tribunal Judge contained material errors of law and is set aside.
  
18. The decision in the appeal is to be remade before the First-tier Tribunal by any First-tier Tribunal Judge except First-tier Tribunal Judge Obhi.

**Deputy Judge of the Upper Tribunal I. A. Lewis      5 August 2014**