



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/39447/2013

THE IMMIGRATION ACTS

Heard at Eagle Building, Glasgow
On 27 May 2015

Determination Promulgated
On 8 June 2015

Before

The President, The Hon. Mr Justice McCloskey
Deputy Judge of the Upper Tribunal JG MacDonald

Between

ILLHAN VURAL

and

Appellant

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Appellant:

Mr C Ndubuisi of Drummond Miller LLP, Edinburgh

Respondent:

Mrs M O'Brien, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The background is set out fully in the Tribunal's error of law decision promulgated on 08 September 2014, which is appended hereto. The decision of the First-tier Tribunal ("*FtT*"), which has been set aside, is hereby remade.
2. The grounds of and reasons for the Secretary of State's refusal of the Applicant's application are rehearsed in [3] of the error of law determination. The Secretary of State's response to the Tribunal's earlier directions resulted in two of the reasons, namely (b) and (h), being withdrawn. This exercise had the further merit of telescoping the basis of the Secretary of State's refusal, in the following terms:

“The SSHD maintains that the Appellant has not shown that his business proposal is any more than disguised employment.”

The further hearing before the Tribunal unfolded accordingly.

3. Evidence was given by the Appellant, his brother resident and settled in Scotland and his brother’s spouse (the Appellant’s sister in law). The cross examination of the Appellant, in tandem with the closing submissions, focused attention on the following areas of concern in particular: the reference to “*accountant*” in the Appellant’s witness statement; the identity of the person who prepared the business plan; the Appellant’s hours of work and income; the circumstances in which the business was established and has evolved; the involvement of his brother’s mother in law in the business lease; the provenance of the funds required to establish the business and the identity of any funder; whether any savings accumulated by the Appellant during his sojourn in Kuwait were invested in the business; and the role, if any, of another brother in Turkey.
4. In the error of law determination the issue relating to the lease has already been considered in some depth. The other issues summarised above were explored in cross examination of the Appellant. This was linked to various parts of the moderately voluminous documentary evidence, in particular bank transfers from Kuwait to Turkey, bank transfers from Turkey to the United Kingdom and various bank statements. The evidence also included a written communication, in the form of a witness statement, from the brother in Turkey. We have considered all of this evidence in the round. Further, we have had the benefit of evaluating the demeanour of the Appellant and the other two witnesses who testified. The fundamental issue is whether there is any sustainable basis for questioning the Appellant’s *bona fides* and disbelieving the case made by him. Is there a concealed funder and/or business proprietor other than the Appellant? To this fundamental question we supply a negative answer. Bearing in mind that the onus of proof is on the Appellant and the civil standard of the balance of probabilities applies, we are entirely satisfied that none of the Secretary of State’s reasons for refusal of the application is sustained. The Appellant’s *bona fides* have been established to our satisfaction.
5. It is appropriate to compliment the Appellant’s solicitors on the high standard of the bundles prepared for this hearing. They are a reflection of industry and expertise, coupled with an appreciation of what is required in the interests of an efficient and expeditious hearing.

DECISION

6. We remake the decision of the FtT by allowing the Appellant’s appeal.

Seamus McCloskey

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 27 May 2015

APPENDIX



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/39447/2013

THE IMMIGRATION ACTS

Heard at Glasgow
on 02 September 2014

Determination Promulgated
on 8 June 2015

Before

The President, The Hon. Mr Justice McCloskey
and
Upper Tribunal Judge Dawson

Between

ILLHAN VURAL

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Appellant: Mr C Ndubuisi of Drummond Miller LLP, Edinburgh

Respondent: Mr M Matthews, Senior Home Office Presenting Officer.

DECISION AND DIRECTIONS

Introduction

1. This appeal originates in a decision made on behalf of the Secretary of State for the Home Department, the Respondent herein, dated 23 September 2013, whereby the application of the Appellant, a Turkish national, for leave to remain in the United

Kingdom under the provisions of the Turkey - European Community Association Agreement (sometimes described as the "Ankara Agreement") was refused. The Appellant's ensuing appeal to the First-tier Tribunal (the "FtT") was dismissed.

The Impugned Decision

2. The Appellant, seeking to avail of the Agreement, based his application for leave to remain on a proposal, contained in a business plan, that he would establish/continue a barber's business in Edinburgh. His application engaged paragraph 21 of HC510 (the Immigration Rules of 1973). Two of the main themes of paragraph 21 are that the business proposal must be both genuine and viable. This provision of the Rules was considered by the Upper Tribunal in Akinci [2012] UKUT 266, which held that the following is the correct approach to paragraph 21:
 - i. The price for acquisition of a business should make commercial sense. An exaggerated price or one which does not reflect in any way the true value of the business may lead to a legitimate enquiry as to the truth of the transaction or the intentions of the parties.
 - ii. A business plan must be realistic having regard to the nature of the enterprise. It is legitimate to ask further questions where the projected turnover is substantially greater than that reflected in the accounts of the business being acquired.
 - iii. Even where a business is not expected to be profitable in the short term, revenue generated may well be enough to meet short term liabilities and provide enough for the applicant's support.
 - iv. It is important therefore to identify the likely liabilities and what the applicant's personal needs are in order to see if they can be met out of cash flow or the initial investment. The test is not whether the applicant is going to get a return on his investment but whether what is projected is likely to enable the applicant to pay the bills arising and meet his living expenses.
 - v. A plan is what it says it is: a projection of how it is anticipated things will work out with the possibility of making adjustments as the business gets under way. It is not a strait jacket.
 - vi. In doubtful cases an applicant's previous experience will help inform the decision-maker whether a projected turnover is likely to be achieved, but such experience is not a pre-requisite.
3. The Respondent's decision to refuse the Appellant's application reasoned as follows:
 - (a) The Appellant's business proposal failed to detail any of his competitors or how he would be able to deal with competition.
 - (b) The suggestion in the business plan that the Appellant's business would offer significantly better value for money than those of his competitors was not supported by market research.

- (c) The claim that the business would make a profit of £60,000 in the first year was undermined by the absence of a pricing structure.
 - (d) In the absence of a Master Craftsman's Certificate, it would not be possible for the Appellant to trade as a barber in Turkey, giving rise to the conclusion that he did not possess the requisite skills.
 - (e) The Appellant's claim that he had operated a barber's salon in Kuwait from 2001 to 2012 was significantly undermined by the absence of any supporting documentary evidence.
 - (f) His application was further undermined by the absence of evidence that he had invested any personal funds in the purchase of the business.
 - (g) Furthermore, there were no bank statements in his name and no evidence that he had registered with the relevant Council to pay business rates.
 - (h) The Appellant had failed to explain why he had remained in the United Kingdom beyond the two week period specified in his entry clearance application form.
4. Given the contours of the appeal to this Tribunal, there is one particular passage in the refusal decision which invites reproduction in full:

"You have failed to provide any lease, sub-lease, or licence agreement for the premises, which names you as the business owner. You are in fact not named at all on any documents provided relating to the ownership of [the relevant property]. The sub-lease agreement provided is between [AK] and [MV] with the landlords of the premises established as [three other named persons]. I am not therefore satisfied you have established that you currently hold any ownership of the business."

We shall return to this issue at a later stage of this judgment.

Decision of the FtT

5. The key passage in the decision of the FtT is in [9]. In the context of rehearsing the submissions of the Appellant's legal representative, the Judge states:

"... I pressed him on a matter arising from the evidence of the brother of the Appellant. In particular in his evidence he stated that the sub-lease for the business premises had been taken in the name of his mother- in- law as if the sub-lease had been taken in his name he would have been liable for increased business rates on another property he owned. I asked this witness if his mother- in- law had any interest in the business in question ... and he confirmed that she did not. I was very concerned about this. If the business was truly that of the Appellant, it was difficult to see why the sub-lease did not run in his name ...

It seemed to me that this witness had given evidence that a business arrangement had been entered into the terms [of] which were designed to not simply avoid liability for rates otherwise due, but to evade liability for them. It seemed to me that the absence of the mother - in- law having any interest in the business whatsoever pointed to the view that there [was a] real possibility of an attempt to avoid evasion [sic] of rates rather than the claimed reason of the landlord not being prepared to grant a sub-lease to the Appellant because of his immigration status."

Developing this theme with some gusto, the Judge continues:

“[The Appellant’s legal representative] did not appear to understand that in effect the witness from whom he led this evidence was potentially incriminating himself in the commission of a fraud ...”

In a later passage in the judgment, the Judge’s omnibus reason for dismissing the appeal is expressed thus:

“I did not consider that there was sufficient credible or reliable evidence before me to allow me to conclude on a balance of probability that the Appellant has established himself in a business such that he could rely on the Standstill Agreement.”

Next, addressing another aspect of the sub-lease issue, the Judge, while not disbelieving the Appellant’s claim that the landlord would transfer the head lease to him following a sub-lease period of two years, was plainly unimpressed by the absence of any written agreement embodying this arrangement. In further passages, the Judge’s reservations about the parties to the sub-lease are re-emphasised. The Judge repeats his view that the sub-lease scheme was designed “*to evade payment of rates that might be otherwise due*”, expressing this as his reason for questioning the honesty of the Appellant’s brother. The Judge also describes the evidence of the Appellant’s mother – in – law as “*unsatisfactory*” and highlights a letter written by the Appellant’s mother – in – law in which it is suggested that she became a party to the sub-lease because the Appellant, by virtue of his immigration status, was precluded from doing so. The Judge, without particulars or elaboration, states that this “*was different from the reason given to me*”. If one links this passage, in [34], with [28] in particular, the “*reason*” to which the Judge is here alluding seems to be “*to suit the business rates position of the brother of the Appellant*”. In the concluding passage, the Judge dismisses the appeal in the following terms:

“I am far from satisfied that the Appellant has shown on a balance of probabilities that this is his business. There appeared to me to be too many difficulties with the evidence of the witnesses in this case and the documentation produced such that I could be satisfied that on balance that if the Appellant does work on these premises as a barber, he does so in his capacity as owner of that business. There are significant credibility issues in this case and the appeal is dismissed.”

Our Conclusions

6. We have, in the foregoing paragraphs, drawn attention to the central issues thrown up by the Appellant’s application for leave to remain, the grounds upon which this was refused by the Respondent and the reasons expressed by the FtT for dismissing the resulting appeal. At the conclusion of the hearing, we gave judgment. Our decision was that, fundamentally, the FtT had misunderstood the evidence relating to the sub-lease arrangement. We have some sympathy with the Judge, given that this was a moderately complex arrangement involving a multiplicity of parties. Ultimately, this judicial misunderstanding was acknowledged by the Respondent’s representative. A failure to properly comprehend evidence bearing on an important issue amounts to an error of law. The materiality of the error in this context is beyond plausible dispute, given that it sounded on one of the refusal reasons, it

related to what the Judge considered an issue of some magnitude and it plainly infected other adverse assessments and findings expressed in the FtT's decision and its overarching conclusion.

7. We further conclude that the FtT erred in law in its discrete finding that the sub-lease arrangement was designed to illicitly evade the payment of rates for the business premises. Once the intricacies of, and plainly acceptable explanation for, the head lease and sub-lease arrangements are fully appreciated, the evidence does not sustain this finding. This too was, ultimately, conceded on behalf of the Respondent. Finally, it was accepted on behalf of the Respondent that the Appellant is by occupation a barber.

Decision

8. For the reasons given at the conclusion of the hearing and elaborated above, we set aside the decision of the FtT.

DIRECTIONS

9. We make the following directions:
 - (a) The appeal will be retained in the Upper Tribunal for the purpose of remaking the decision.
 - (b) This panel will conduct the rehearing on 08 December 2014 at the same venue.
 - (c) The Respondent will, within 21 days of the date hereof, state in writing, with particular reference to the 'menu' in [3] above:
 - (i) Which issues are conceded.
 - (ii) Which issues remain in dispute.
 - (d) The Respondent will also, within the same time limit, set out its proposals for the preservation of findings in the FtT's determination.
 - (e) The Appellant's representative will respond in writing to (c) and (d) above within a further period of 21 days.
 - (f) The Appellant's representative will ensure that two copies of the Appellant's bundle/s, fully indexed and paginated, are available for the panel Judges by 01 December 2014 at latest.
 - (g) The remaking of the appeal will be listed as a half day hearing.

Seamus McCloskey

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Dated: 06 September 2014