Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33299/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 January 2015	**On 30 January 2015**

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

MR HASAN ONUR YILMAZ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Karim, Counsel instructed by Oakfield Solicitors LLP
For the Respondent: Mr C Avery, Home Office Presenting Officer

DECISION AND REASONS
Delivered orally on 20 January 2015

Introduction

1. The appellant is a citizen of Turkey born on 15 September 1988. On 3 August 2012 he was granted leave to enter the United Kingdom as a business visitor such leave being conferred until 3 February 2013. On 31

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January 2013 the appellant applied for leave to remain pursuant to the provisions of paragraph 21 of HC 510 in order to establish himself in business as a painter and decorator.

2. To set the backdrop to this appeal, it is settled law that the Immigration Rules which came into force in 1972, i.e. HC 509 and HC 510, are the Rules which ought to be applied to Turkish nationals who have made applications of this sort as of a consequence of Article 41(1) of the Additional Protocol to the EEC Turkish Association Agreement - otherwise known as the standstill clause.

3. Paragraph 21 of HC 510 sets out the requirements relevant to the instant, and states as follows:

> "**Businessmen and Self-employed Persons**
>
> 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 its 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, audited 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 twelve 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."

4. By a Reasons for Refusal Letter dated 5 July 2013 the Secretary of State refused the appellant's application - concluding that he had not demonstrated that (i) he genuinely wished to establish himself in business as proposed (ii) he would be bringing into the country money of his own to establish such business or (iii) the business that he claimed he was intending to establish was not a viable one.

Error of Law

5. Mr Yilmaz appealed to the First-tier Tribunal against the Secretary of State's decision and that appeal was heard by Judge Vaudin d'Imecourt on 23 December 2014. In paragraphs 24 and 25 of his determination the judge sets out the core of his reasoning in the following terms:

> "24. … The appellant has failed to corroborate by evidence that he is bringing into the United Kingdom money of his own to invest in his claimed business, but given the effort that the appellant has put into establishing the business by way of adverts and setting up a limited company in his name and given that I found him to be a credible witness, I am prepared to accept his word that the money is his own.
>
> 25. Having said this and having heard the appellant give evidence and having looked at all the other evidence available in this case including evidence that he would have clients available to him should he be granted permission I was satisfied that the prospect of setting up a successful business as a painter and decorator within the Turkish community alone in London was probably available to the appellant and that he could run a credible business. He has done more than most people do in these cases and has provided evidence that he has an insurance cover for his business; he has provided evidence that he has set up a limited company; he has also provided evidence that he intends to obtain a driving licence. He has, more importantly, provided evidence that there are companies within the Turkish community who would be prepared to employ him on a sub-contractual basis after they had tried him out unpaid. I am satisfied that this would not be disguised employment. Nevertheless, although I find that the appellant's estimated income for his first year in business is a figure that is not supported by cogent evidence, I was satisfied that the appellant would nevertheless probably be able to support himself from his first year's income."

6. If one pauses here, the overriding impression one gets from these passages is that the appellant meets the requirements of paragraph 21 of HC 510. However, despite the fact that no further rationale was provided by the judge in this regard, he concluded in paragraph 29(1) of the determination, that "the appeal under the Immigration Rules is dismissed".

7. Mr Avery submitted that such conclusion was sustainable because on a proper analysis of paragraphs 24 and 25 the judge had concluded that the appellant had not demonstrated that the business he proposed to run was one that would be viable.

8. Even if this is the correct interpretation of the judge's rationale for dismissing the appellant's appeal under the Immigration Rules, which in my conclusion it plainly is not, then it is certainly not something that can be easily found from a reading of paragraphs 24 and 25, or indeed elsewhere in the determination.

9. On my reading of paragraph 25 the judge, having found both that the appellant could run "a credible business" and that he would be able to support himself from his first year's income is, in fact, concluding that the business that the appellant proposes to run is one that is viable.

10. There is simply nothing in the judge's reasoning which allows a reader of the determination to understand why, having made findings of fact

favourable to the appellant, he then went on to conclude that the requirements of the Immigration Rules had not been met. I find this failure of reasoning to amount to an error of law that requires the First-tier Tribunal's determination to be set aside and I do just that.

11. Before moving on I also pass comment on paragraphs 26 and 27 of the determination. In paragraph 26 the judge cites from an Immigration Directorate Instruction that relates to applications for entry clearance and leave to enter. As a consequence of the terms of this Instruction the judge concludes that the matter should be referred back to the Secretary of State to reconsider. I cannot discern what the judge's underlying rationale was for considering the cited paragraph of the Immigration Directorate Instructions to be of any relevance to this appeal. It plainly is not. The appellant was neither making an application for entry clearance nor one for leave to enter. The making of either of these applications is a prerequisite to the application of the cited paragraph from the IDIs. The appellant's application was for an extension of stay or, to put it another way, for leave to remain. He already had leave to enter.

12. The judge's reliance on the Immigration Directorate Instructions in my conclusion also amounts to an error of law, although not one that operates in the appellant's favour.

Re-making of decision

13. Both parties agreed that it would be appropriate for me to remake the decision on appeal for myself on the basis of the findings set out in paragraphs 24 and 25 of the First-tier Tribunal's determination.

14. On the basis of such findings it is palpably clear that the appellant meets all of the requirements of paragraph 21 of HC 510 and, consequently, I must allow his appeal on the basis that the Secretary of State's decision was not in accordance with the Immigration Rules.

Notice of Decision

For the reasons set out above:

(i) The decision of the First-tier Tribunal is set aside;
(ii) Upon remaking the decision on appeal for myself, I allow the appellant's appeal on the basis that the Secretary of State's decision was not in accordance with the Immigration Rules contained in HC 510

No anonymity direction is made.

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a fee award in the sum of any fee which has been paid or may be payable by the appellant.

Signed:

Upper Tribunal Judge O’Connor
Date: 22 January 2015