Upper Tribunal
(Immigration and Asylum Chamber)

OT (Ankara agreement: students, businessmen, workers) Turkey [2010] UKUT 330 (IAC)

THE IMMIGRATION ACTS

Heard at Newport (Columbus House) **Determination Promulgated**

On 20 November 2009

.....

Before

Mr C M G Ockelton, Vice President

Senior Immigration Judge Grubb

Between

OT

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr A Duncan of Duncan Moghul Solicitors & Advocates

For the Respondent: Mr I Richards, Home Office Presenting Officer

1. HC 510 contains no provision entitling a person admitted as a student to remain (or seek leave to remain) as a businessman;

2. R (Payir and others) v SSHD has no application to those who are, or claim to be, businessmen as distinct from “workers”.

DETERMINATION AND REASONS

Introduction: the Respondent’s decision

1.
The Appellant, a national of Turkey, appealed to the Asylum and Immigration Tribunal against the decision of the Respondent on 3 December 2008 refusing to vary his leave. Immigration Judge Hart dismissed his appeal. The Appellant sought an order for reconsideration, which was refused by the Tribunal, but granted on renewal to the High Court. The reconsideration was heard by the AIT but, by virtue of paragraph 4 of Schedule 4 to the Transfer of Functions of the Asylum and Immigration Order 2010, now continues as an appeal to this Tribunal.

2.
The Appellant came to the United Kingdom as a student on 31 January 2007. He obtained further leave to remain as a student, under the Immigration Rules, which was due to expire on 30 June 2008. Within the period of that leave he made an application to remain as a Turkish businessperson, under the terms of the Ankara Agreement. The application was made on 7 March 2008, and was accompanied by a form, in which the Appellant stated that he had started his business on 24 October 2007, and various financial and other documents relating to it. The application was refused for reasons which we need to set out in full:

"Kuddus Solicitors applied on your behalf for further leave to remain in the United Kingdom as a self-employed business person under HC510, the Immigration Rules in force as at 1973, by virtue of the terms of the EC Turkish Association Agreement.

An official has considered your application on behalf of the Secretary of State.

You established your business on 26 October 2007 in breach of the conditions of your previous leave to remain as a student which prohibited setting up in self employed business.

It is our position that establishing a business in breach of the conditions of your previous leave is tantamount to fraudulent activity and you are therefore excluded from taking the benefit of the standstill clause contained in the ECAA which gives effect to these Rules.

In order for you to obtain leave to establish in business you need to meet the relevant requirements in paragraphs 206 of HC395, the current Immigration Rules. Your application is refused in accordance with paragraph 208 of these Rules because you did not enter the UK with valid entry clearance in this capacity.

Therefore, you do not satisfy the requirements of the Immigration Rules for this category and it has been decided to refuse your application for leave to remain as a self employed business person under HC510, the Immigration Rules in force as at 1973 under **paragraphs 4 and 21 of HC510 and paragraphs 206 and 208 of HC395 (as amended).** "

The appeal to the Immigration Judge

3.
The grounds of appeal are headed "Appeal Statement". They are in the vaguest of terms, but appear to amount to an assertion that the Appellant's application met the requirements of relevant immigration rules. The Appellant's representative produced a skeleton argument for the hearing before the Immigration Judge. That bases the Appellant's appeal on the following propositions. (a) The Ankara Agreement of 1963 and article 41 of the Additional Protocol established the "standstill clause", that is to say the prohibition on introducing any new restrictions on the freedom of establishment and the freedom to provide services. (b) As a student, the Appellant has permission to work, subject only to the requirement that he requires authorisation from the Respondent. "The Appellant sought authorisation to set up as a self-employed businessman and it is the refusal of that application which is the matter currently under appeal". (c) The Appellant has not acted "fraudulently" within the meaning of relevant European law. (d) The decision of the European Court of Justice in R (Payir and others) v SSHD C294/06 establishes that the fact that the Appellant was granted leave to enter as a student cannot deprive him of the status of "worker" and cannot prevent him from relying on provisions enabling him to renew his permission to work and have a right of

residence. The Respondent is therefore not entitled to refuse his application on the basis that he was originally admitted as a student.

4.
The Immigration Judge took into account the authorities to which he had been referred, and others, including Tum and Dari v SSHD [2007] INLR 473, LF v SSHD [2007] EWCA Civ 1441, and IY v SSHD [2008] UKAIT 00081. He observed that his task was to attempt to interpret and apply the law as a whole, not the selected parts of it to which the parties had made reference.

5.
He noted the terms of paragraph 57 of the Statement of Changes in Immigration Rules , HC 395, and observed that the restriction on engaging in business or taking employment was "well known". He had before him photocopies of the Appellant's passport, containing both the grants of leave, the first endorsed "work (and any changes) must be authorised", the second "able to work as authorised by the Secretary of State". It is clear that the principal factual submission made before him, as adumbrated by the skeleton argument, was that the Appellant was seeking permission for future work: he had not previously worked, and as a result had not breached the conditions of his leave.

6.
The Appellant gave evidence that he had undertaken his studies, finishing perhaps on 31 May 2008 (there appears to have been some doubt about it). So far as the business was concerned, the Appellant's case before the Immigration Judge was that in October 2007 he had set up a company to take over a business he was purchasing. But although he had moved into the flat above the business, he took no part in it at all. His own part in the business was still in the future.

7.
The Immigration Judge's conclusion on that issue was as follows:

"68. In the light of all I have set out above, I do not accept the Appellant's apparent claim that he was not conducting the business. In his brief evidence, he has tantamount accepted that he did run the business through the medium of the limited company and, since the retirement of his partner, had done so alone. He has not otherwise explained how the company was running itself and thus operating its shop business without his direction and control. I do not find credible the Appellant's evidence that since November 2007 he has sat day by day during shop opening hours in the flat over the shop without taking any part in the activities of running a company. It is self-evident that a director of the company may not himself produce the goods or services for which the business is constituted. In this case the business plan clearly describes the Appellant as a chef. I do not imagine that it would have stated that if it were not to be so. I therefore find that the Appellant has not only on his own admission participated in the setting up [and] operation of the business but has also participated in its business activities for which it was established. He has established and has since been running the business. He has been the sole proprietor since his partner was refused similar permission. He has not claimed that his erstwhile partner did all the work.

69. The whole weight of the application was that the business had been up and running in November 2007 having taken over a going concern and that going concern had not simply been closed down and left dormant until such time as the Appellant and his colleague received the sanction of the Respondent.

70. In respect to Mr Duncan's submissions and the apparent aim of his case, it is not a matter for the Respondent to prove that the Appellant had been working in the shop, carving kebabs, preparing

pizzas or cooking chickens. He was running the business. His leave as a student prohibited him most clearly from self-employment by engaging in business. He did so in breach of that leave. Moreover, I find that he had embarked upon the business many months before he made his application and above all before being given permission by the Respondent to establish that business."

8.
The Immigration Judge went on to say that the Appellant was not entitled to rely on his own wrong by working in breach of his leave, in order to claim that he met the requirements of HC510, the immigration rules in force in 1973 and hence applicable to the Appellant under the "standstill" provisions. He accordingly found that the Respondent's decision was the correct one.

9.
In passing, the Immigration Judge had devoted some attention to whether the Appellant could be regarded as genuinely a student. He clearly had some doubt about the Appellant's pursuit of his studies, and his qualifications. At paragraph 64 of his determination, he said this:

"I find that the Appellant finished his studies by October 2007. There was no evidence that he in fact continued his studies and in particular remained in London for that purpose after that date".

The application for reconsideration

10.
The grounds for reconsideration were drafted by counsel and raise three discrete issues. The first is that the Immigration Judge should not have dealt with the question whether the Appellant had ceased to be a student. It had not been raised by the Respondent. If it was to be raised by the Immigration Judge, he needed to give the Appellant an opportunity to deal with this. The Appellant had been prejudiced. The second ground is that the Immigration Judge erred in law and reached an irrational conclusion "in that he did not accept that the Appellant had only completed purchase of the business on 15 August 2008… it is contended that the Immigration Judge's approach to the evidence regarding the purchase of the business was clouded by his concerns over the lack of evidence relating to the Appellant's studies between October 2007 – May 2008". The third ground is that the Immigration Judge erred in failing to consider all relevant factors under Article 8 of the European Convention on Human Rights.

11.
The Senior Immigration Judge who refused reconsideration, pointed out that there was nothing to suggest that the Appellant had any answer to the Immigration Judge's concerns about him having ceased his studies, and that the second and third grounds merely amounted to disagreement with the Immigration Judge's conclusions.

The reconsideration hearing

12.
When the application was renewed to the High Court, without seeking any permission to do so, the Appellant's representative added further grounds, which were phrased in terms of failure by the Senior Immigration Judge to consider issues which had not (in fact) been put to him. In addition to the grounds lawfully renewed, it was submitted that the Senior Immigration Judge had erred by failing to take into account the practice of Home Office Presenting Officers at Field House (on which no evidence had been offered), had failed to take into account Payir (which had not formed the subject of any ground before him), and had erred in failing to consider Article 8. The High Court Judge made no

distinction between the grounds properly renewed to the High Court and those simply added without any permission. He said this:

“1. There may be merit in the claimant’s submission that having been taken by surprise on the question as to when he ceased to be a student, he did not have the opportunity to produce relevant evidence on the issue that may have been material to whether he had breached the conditions of his leave to remain by taking employment in the business.

2. The AIT should further examine whether operating a business in breach of an express restriction on leave, can be equated to fraudulent conduct in the light of paragraphs 40 and 41 of ECJ 294/06 Payir and others ECJ which is binding as to when the Ankara Agreement applies.

3. Further the AIT will need to consider whether a rule preventing a student from taking over and running an existing business is itself in breach of the standstill clause in the Ankara Agreement.”

13.
At the reconsideration hearing, Mr Duncan addressed no submissions on the two latter points taken by the learned judge, though we shall have to deal with them in this determination. So far as the other point is concerned, Mr Duncan’s submission was that the Immigration Judge had found that the breach of the conditions of his leave meant that the Appellant had ceased his studies. Although Mr Duncan was unable to substantiate that, he then directed his submissions to establishing that the Immigration Judge had erred in his interpretation of the evidence relating to the purchase and running of the business. In the course of his submissions on that issue, we drew attention to a document in the bundle before the Immigration Judge and before us, that is to say the request for transfer of a VAT registration number. That contains a declaration, signed by the Appellant, that “I took over the business as a going concern on 26/10/07”. After taking instructions, Mr Duncan said this to us:

“The date on that declaration is incorrect. It was a falsehood. The Appellant told the VAT authorities a complete lie. He had not taken over the company on the date he said.”

14.
Mr Duncan’s position was that, on the facts, the Appellant was entitled to rely on the “standstill” provisions of the Ankara agreement, and accordingly that his application was to be considered under HC510, and was therefore to be granted. We asked him to point to the provisions of HC510 which would have allowed the Appellant’s application to be granted. He conceded that there were none, but said that “the door was open”.

Discussion

15.
There are a number of layers to this case, and we need to separate them in order to reach a coherent decision on it.

(i) The Appellant’s studies

16.
We have considerable sympathy with the view that the Immigration Judge risked unfairness to the Appellant by raising without prior notice the question of whether the Appellant was genuinely undertaking any course of studies at the time when he began the purchase of the business. If the question whether the Appellant had continued as a student was relevant to the determination of this

appeal, it might have been that the Immigration Judge's treatment of that issue would require reconsideration. But it was entirely irrelevant. The question was not whether the Appellant was still studying, but whether he was engaging in business. The Immigration Judge's finding was that the Appellant was engaging in business. We are entirely unable to accept Mr Duncan's submission that the Immigration Judge found that the Appellant was engaging in business because he was not a student. The Immigration Judge found that the Appellant was engaging in business on the evidence relating to the business. We are also unable to accept the submission made in the grounds (but not expressly pursued before us) that the Immigration Judge's conclusion that the Appellant had ceased his studies influenced his decision that the Appellant was engaging in business: as is clear from the passage we have cited from his determination, the Appellant's other activities or lack of them played no part in the Immigration Judge's reasoning in relation to engaging in business.

17.
Any error of law made by the Immigration Judge in his raising and deciding the issue of whether the Appellant was still pursuing studies is thus entirely immaterial to the determination of the appeal.

(ii) Buying the business and "engaging in business"

18.
The grounds for reconsideration argue that the Immigration Judge was not entitled, on the evidence, to find that the Appellant had completed the purchase of the business before his application for leave as a businessman. They point to evidence before the Immigration Judge that the purchase of the business was not completed until July 2008. This issue is entirely immaterial. The question for the Immigration Judge did not concern the ownership of the business: it concerned its operation and, in particular, the question of the Appellant's own activities.

(iii) Was the Appellant engaging in business?

19.
This is a matter not dealt with by the grounds for reconsideration, but it was the subject of Mr Duncan's submissions before us. As we have observed, in the course of those submissions the Appellant made, for the first time as we understand it, a statement that he had deliberately lied to the VAT authorities.

20.
The Immigration Judge did not believe the Appellant's evidence. The admission made before us, evidently designed to improve the Appellant's case that he had not begun working before making his application, simply confirms the Immigration Judge's view that the Appellant's word is not to be relied on. The Immigration Judge took a balanced view of the evidence and concluded that the Appellant had been engaging in business from the time when he became involved in the business in October 2007. In our view the Immigration Judge was amply entitled to reach that conclusion on the facts, for the reason he gave. There was no error in law.

21.
It follows (and if those are the facts it is not disputed) that the Appellant was in breach of the conditions of his leave as a student.

(iv) "Standstill"

22.

Because of the “standstill” clause of the Ankara Agreement, the Appellant has to be considered under terms no less favourable than would have applied to him in 1973. If in 1973 his setting up of business would not have been regarded as a breach of his leave as a student, it is arguable that no such condition could have been imposed on his leave now. The relevant provisions of HC510 are as follows:

“13. Applications from students or would-be students for variation of their leave will consist mainly of applications for extension of stay as a student. An extension for an appropriate period, normally up to 12 months, may be granted if the applicant produces evidence, which is verified on a check being made, that he has enrolled for a full-time course of daytime study which meets the requirements for admission as a student; that he is giving regular attendance; and that he has adequate funds available for his maintenance and that of any dependants. When an extension is granted the student may be reminded that he will be expected to leave at the end of his studies.

14. Doctors, dentists and nurses admitted as postgraduate students will be permitted to take full-time employment which is associated with their studies. Other bona fide students may, with the approval of the Department of Employment, work in their free time or vacations and there is no restriction on the freedom of their wives to take employment: earnings so obtained may be taken into account when assessing the adequacy of their arrangements for maintenance. If the Immigration Officer imposed a condition prohibiting employment on someone who later establishes satisfactorily that he is engaged on a full-time course of studies, the condition may be varied to one permitting him to take approved employment. Except as mentioned in this paragraph, employment is inconsistent with student status.

[There are then special provisions for student employees, trainees, au pairs, and work permit holders.]

Businessmen and self-employed persons

21. 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 dependents. 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.”

23.
It is clear that paragraph 21 allows a person admitted as a visitor to “switch” category to that of a businessman. Paragraph 21 also draws the clearest imaginable distinction between businessmen and those in employment, of which we shall have more to say shortly. But we do not see any suggestion in HC510 that a person admitted as a student should be entitled to “switch” to being a businessman. In 1973 as today a student could undertake employment only with the consent of the Secretary of State.

In 1973 there was, as there is not today, the statement that, in general, “employment is inconsistent with student status”. It is perhaps conceivable that mere ownership of a business would not be regarded in the same way, but it is very difficult indeed to see that the Immigration Rules as they were in 1973 provide any facility for a student to be allowed to remain as a businessman, whether that word is taken as meaning a person who merely owns a business, or a person who is occupied in business.

24.
It is clear from the respondent’s refusal of the present application and the Immigration Judge's determination that the case has so far been conducted on the basis that the rules as they were in 1973 would have permitted a person admitted to the United Kingdom as a student to obtain further leave as a businessman. That does not appear to us to be the case. Nor does it appear that HC510 envisages the possibility of a student spending his time engaging in a business of his own.

(v) Payir

25.
It is very difficult to see how the decision of the European Court of Justice in Payir advances the Appellant's case at all. The claimants in that case were au pairs and students who had been employed lawfully in the United Kingdom in accordance with the provisions of their respective grants of leave. They claimed to have thereby attained status as “workers”, and therefore to be able to rely on the provisions of Article 6(1) of Decision No 1/80 of the Association Council of 19 September 1980 on the development of the Association. That Article provides as follows:

“1. Subject to Article 7 on free access to employment for members of his family, a Turkish worker duly registered as belonging to the labour force of a Member State:

-
shall be entitled in that Member State, after one year’s legal employment, to renewal of his permit to work for the same employer, if a job is available;

-
shall be entitled in that Member State, after three years of legal employment and subject to the priority to be given to workers of Member States of the Community, to respond to another offer of employment, with an employer of his choice, made under normal conditions and registered with the employment services of that State, for the same occupation;

-
shall enjoy free access in that Member State to any paid employment of his choice, after four years of legal employment.”

26.
The government’s position was that although the claimants’ employment was legal, their status as au pair and students respectively prevented them from being regarded as “workers”. That argument was rejected by the court. At paragraphs 28-30 the court identifies the claimants as workers because they were employed, performing services for and under the direction of another person in return for remuneration; they had met the conditions laid down by law or regulation in the host member state for their working, and they had legal employment, that is to say a stable and secure situation as a member of the labour force of the host member state. In those circumstances the purpose of their admission was not to be taken as restricting the rights granted by Article 6(1) of Decision No 1/80.

27.
In the present case, the Appellant has never been employed. He has never provided services for somebody else, or worked under anybody's direction. His case is that, before his application, he had never worked at all. On the facts as found by the Immigration Judge, he engaged in business – his own business – from October 2007. Whatever arguments might be raised as to the legality of any restriction on his employment, the simple fact is that he has not been employed and is not a "worker". The distinction drawn in paragraph 21 of HC510 is apposite. His application and his claim was that he was a businessman. As paragraph 21 makes clear, a person seeking leave as a businessman must not be in disguised employment. His application was itself inconsistent with any claim under Payir and Article 6(1) of Decision 1/80.

(vi) Article 8 of the European Convention on Human Rights

28.
Article 8 did not form part of the grounds of appeal to the Immigration Judge. It was raised for the first time in the grounds for reconsideration. The Immigration Judge had no obligation to consider an argument which was not put to him, and we observe that the order for reconsideration does not suggest any error of law in this regard.

Conclusions

29.
Throughout the proceedings, the Appellant has attempted to show that he had not engaged in business before making his application. That submission has failed on the facts. The Appellant therefore falls to be regarded as a person who has breached the terms of his leave. On the Immigration Judge's findings, he has been involved in and occupied in the business since October 2007.

30.
He is not entitled to be regarded as a worker; indeed he puts no case that would have enabled him to be so regarded. His application, and his appeal, are on the basis that he is entitled to remain in the United Kingdom as a businessman. But he has pointed to no provision in the rules either of 1973 or now, that would enable him to "switch" from being a student to being a businessman. Indeed, as we read them, the 1973 rules would have regarded occupation in a business as in principle inconsistent with being a student.

31.
Even if that were not so, his application under HC510 was, as both the Immigration Judge's findings and the hearing before us have established, based on either documents, or assertions or both, which were not true. Whatever the Appellant's position might in theory have been, he has no entitlement to leave to remain on the basis of an application supported by falsehood.

32.
For the foregoing reasons the Appellant's appeal in our judgement falls necessarily to be dismissed. Any errors made by the Immigration Judge were accordingly immaterial, and we dismiss the Appellant's appeal.

Signed

C M G OCKELTON

Vice President of the Upper Tribunal (Immigration and Asylum Chamber)