**Upper Tribunal**
**(Immigration and Asylum Chamber)**

Kop (dishonesty alleged - HC 510) [2012] UKUT 00264(IAC)

**THE IMMIGRATION ACTS**

| **Heard at Royal Courts of Justice** | **Determination Promulgated** |
|---|---|
| **on 22 May 2012** | ..... |

**Before**

**UPPER TRIBUNAL JUDGE SPENCER**

**Between**

**ALI KEMAL KOP**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation :**

For the Appellant: Mr R Layne, Counsel, instructed by Oakfield Solicitors

For the Respondent: Ms C Gough, Home Office Presenting Officer

While HC 510 does contain provisions for general grounds of refusal, unlike more recent immigration rules, those general grounds do not specify refusal on current paragraph 320(7A) or 322(1A) grounds.

**DETERMINATION AND REASONS**

1.
The appellant is a citizen of Turkey, born on 17 th October 1984. His appeal against the decision of the respondent, made on 26 th April 2010, refusing his application for leave to remain in the United Kingdom in order to establish himself in business under the EEC – Turkey Association Agreement ("the ECAA"), was dismissed after a hearing before First-tier Tribunal Judge Scobbie, in a determination promulgated on 12 th December 2011.

2.
It appears that on 10 th March 2009 the respondent granted twelve months' leave to the appellant, who had previously entered the United Kingdom as a visitor, to remain in the United Kingdom as a businessperson under HC 510 by virtue of the terms of the EEC – Turkey Association Agreement. The appellant applied for an extension of stay for three years on 12 February 2010. His application was

refused by the respondent on the grounds that the entry clearance visa contained in his passport was not genuine and that he had entered the United Kingdom illegally. It was said that he had employed fraudulent/abusive activity in order to make his application and establish himself in business. Taking all the circumstances of his case into account, it had been decided to exclude him from taking the benefit of the standstill clause contained in the ECAA which gave effect to those provisions. It was further said that in order to qualify for leave to remain he needed to meet the requirements of paragraph 245L of HC 395, as amended, but his application was refused under paragraph 322(1A) on the basis of false representations having been made or false documents or information having been submitted in relation to the application.

3.
In paragraph 14 of his determination the First-tier Tribunal judge said that the background was that the appellant, on trying to make some headway with regard to his application in February 2010, was eventually arrested at an appointment and a criminal prosecution was brought against him. The basis of the criminal prosecution was that the appellant had false ID, entered the United Kingdom by deception and obtained leave by deception. The information which the judge had, which was in less than perfect form, showed that when the case first went to trial the jury were unable to reach a verdict and a retrial was arranged but when the retrial was due to commence, the Crown offered no evidence (and a verdict of not guilty was entered). The note prepared by counsel who represented the appellant was not signed, but the First-tier Tribunal judge was inclined to accept that that was what happened. In paragraph 15 of his determination he said the position of the appellant was that he accepted that the visa on his passport was false but the appellant knew nothing about it. His position was that the matter was in the hands of an agent who produced it to him and he had used it successfully in the past. Only when he was arrested did it come to his attention that the visa was false.

4.
In paragraph 16 of his determination the First-tier Tribunal judge said he had looked at the wording of paragraph 322(1A) carefully and believed it was not helpful to the appellant. The paragraph stated that an application was to be refused, in other words it was mandatory, where false representations had been made or false documents or information had been submitted (whether or not material to the application and whether or not to the applicant's knowledge) or material facts had not been disclosed in relation to the application. In paragraph 17 he said there was little doubt that a false document was submitted. Although a criminal prosecution was unsuccessful against the appellant, the appellant accepted that the visa on his passport was false. It was his clear position at the hearing before him. The First-tier Tribunal judge said that accordingly the phrase "whether or not to the applicant's knowledge" was relevant. The appellant's position was clearly that he left the matter in the hands of an agent and he had no knowledge that the visa was false. It did not appear to matter whether or not he knew that the visa was false. What mattered was that it was false. In paragraph 18 he said the fact that the appellant submitted a document which he now accepted to be false did seem to defeat him in accordance with the wording of paragraph 322(1A). Accordingly the appeal must fail. He felt that the comments in paragraph 67 of the case of AA (Nigeria) v Secretary of State for the Home Department [2010] EWCA Civ 773 supported his view on that matter.

5.
On 13 th January 2012 First-tier Tribunal Judge Davey granted permission to appeal on the following grounds:

“1. Grounds numbered 1-3 raise an arguable error of law concerning the application of paragraph 322(1A) of the Immigration Rules HC 395 as amended, given the accepted factual context that at a retrial of the Appellant the Crown offered no evidence in respect of the fraudulent use of a document.

2. Ground 4 raises the issue of the need for a visa but there will need to be the relevant case law and skeleton argument to demonstrate any substance in the point.

3. Ground 5 refers to Article 8 ECHR but the matter does not appear to have been raised as an issue at the hearing before Immigration Judge Scobbie. This ground does not disclose any arguable error of law.”

6.
In relation to the refusal of the application, treated as having been made under the current immigration rules under paragraph 322(1A) of HC 395, as amended, in my view the appeal had no chance of success in the light of the decision of the Court of Appeal in AA (Nigeria) . In paragraph 68 of his judgment Rix LJ, with whom the remaining members of the Court agreed, said:

“Secondly, however, a false representation stated in all innocence may be simply a matter of mistake, or an error short of dishonesty. It does not necessarily tell a lie about itself. In such a case there is little reason for a requirement of mandatory refusal, although a power, even a presumption, of discretionary refusal would be understandable. It is noticeable that paragraphs 320 and 322 also contain grounds on which entry clearance, leave to enter, or leave to remain, as the case may be, "should normally be refused". If on the other hand a dishonest representation has been promoted by another party, as happened with the sponsor husband in Akhtar , then it is entirely understandable that the rule should require mandatory refusal, irrespective of the personal innocence of the applicant herself. Therefore, the reason of the thing, as well as the natural inference that "false" in relation to "representations" should have the same connotation as "false" in relation to "documents", together argue for a conclusion that "false" requires dishonesty – although not necessarily that of the applicant himself.”

7.
In paragraph 76 of his judgment Rix LJ said, whether as a matter of the interpretation solely of the relevant rules in paragraphs 320(7A), 320(7B) and 322(1A), but in any event when consideration was also given to the assurances given in the Lords’ debate as supplemented by the Minister's letter to ILPA dated 4 April 2008, and to the public guidance issued on behalf of the executive, the answer became plain, and in essence was all of a piece. Dishonesty or deception was needed, albeit not necessarily that of the applicant himself, to render a "false representation" a ground for mandatory refusal.

8.
Paragraph 322 provided grounds on which leave to remain in the United Kingdom was to be refused. Sub-paragraph (1A) provided that this was to be the case:

“where false representations have been made or false documents or information have been submitted (whether or not material to the application, and whether or not to the applicant’s knowledge), or material facts have not been disclosed, in relation to the application.”

The conclusion of the Court of Appeal was that although the applicant had not been guilty of personal dishonesty, he was caught by this provision. It was based on the wording of the sub-paragraph “… whether or not to the applicant’s knowledge”.

9.
It is common ground that in terms of Article 41(1) of the Additional Protocol to the EEC – Turkey Association Agreement, known as the "standstill clause" the United Kingdom was and is barred from imposing conditions for business applicants less favourable than those which were in force when the United Kingdom became bound by the agreement in 1973. Ms Gough conceded that the appellant had been acquitted of dishonesty in relation to the use of the false stamp in his passport but nevertheless asserted that fraud or dishonesty could be imputed to him under paragraph 322(1A). The difficulty about that assertion is that HC 510 did not contain a paragraph which in any way related to the terms of paragraph 322(1A) of HC 395, as amended.

10.
Paragraph 2.1.1 of Chapter 6, Section 6 IDI, May 2011, which deals with business applications under the Turkish – EC Association Agreement (ECAA) where it can be shown that an applicant has created the opportunity to apply to establish in business only by virtue of having sought or obtained leave by deception i.e. has made false representations, has presented false documentation or failed to disclose material facts, the applicant is considered to have engaged in abuse. This includes applications to which paragraph 321(i) and 322(2) of the current rules apply e.g. if entry clearance has been obtained by deception, particularly in light of the availability of entry clearance under the On Entry 1973 business provisions. P aragraph 3.2.1 which deals with those in possession of Turkish ECAA businessperson entry clearance says that:

" Where it becomes apparent that a passenger has obtained their businessperson entry clearance by deliberately making false representations, presenting false documents or withholding information this is considered to amount to fraudulent or abusive conduct (refer to 2.1) with the result that the passenger is excluded from taking the benefit of the standstill clause and assessed under the current rules. Their entry clearance should be cancelled under paragraph 321(i) and entry should be refused.

Where it becomes apparent that a passenger in possession of an ECAA businessperson entry clearance has either obtained the entry clearance as the result of false representations or the use of false documentation, but without the passenger's knowledge or where there has been a change in circumstances since the entry clearance was issued the passenger should be assessed under the 1973 On Entry rules and be refused if applicable in accordance with paragraph 12 of HC509."

11.
The terms of the IDI are in themselves conflicting. Nevertheless the IDI did not exist in 1973. In LE (Turkey) v Secretary of State for the Home Department [2010] (CSOH 153) Lord Emslie had to deal with a situation where it was said that the Immigration Directorate Instructions current from June 2009 onwards which must be taken to have informed the refusal complained of, were materially less favourable to an "overstayer" in the petitioner's position than had previously been the case. Lord Emslie reached the conclusion, ultimately without much hesitation, that the petitioner's contentions were well-founded and must be sustained. On the authority of Savas (external relations) [2000] EUECJ C-37/98, a standstill clause conferred direct rights which might be enforced by an individual against an affected State. Savas again appeared to him to vouch the proposition that new restrictions must not be allowed to affect applications in any form or to any material degree. Comparing the June 2009 instructions with what had gone before, it was to his mind impossible not to hold that a more restrictive approach was introduced at that time.

12.

It is significant in my view that in the immigration rules in force from 1 st May 2007, paragraph 322(1A) provided for refusal of leave without the addition of the words “whether or not to the applicant’s knowledge”. There is nothing in HC 510 or any other material that has been drawn to my attention which shows that in 1973 an applicant was to be imputed with the dishonesty of another person where he himself was without blame.

13.
In any event it can be seen that the approach of the respondent was without question unlawful in the light of the decision of the Court of Justice of the European Communities in Oguz (external relations) [2011] EUECJ Case C-186/10. In paragraph 28 of its judgment the Court said that a standstill clause, such as that embodied in Article 41(1) of the Additional Protocol, did not operate in the same way as a substantive rule by rendering inapplicable the relevant substantive law which it replaced, but as a quasi-procedural rule which specified , ratione temporis , the provisions of a Member State's legislation that must be referred to for the purposes of assessing the position of a Turkish national who wished to exercise freedom of establishment in a Member State. In paragraph 31 of its judgment the Court said the standstill clause did not therefore preclude Member States from penalising within the framework of national law, abuse relating to immigration. In paragraph 32 the Court said the standstill clause must accordingly be understood as applying to a stage before the merits of the case were assessed and before an assessment was made as to whether there was any abuse of rights which might be imputed to the party concerned. In that regard the Court had held that the issue of whether or not a Turkish national was legally resident in the territory of a Member State at the time of his application to establish himself in that State was irrelevant for the purpose of applying the standstill clause. Consequently, in accordance with the case-law, which was the decision in Tum & Dari (external relations) [2007] EUECJ Case C-16/05, the fact that an individual, such as Mr Oguz, had not complied with the conditions attaching to his leave to remain was irrelevant for the purpose of applying Article 41(1) of the Additional Protocol.

14.
The decision went on to differentiate the position in that case from the position of the applicant in Kondova [2001] ECR 1-6427. In that case the applicant had knowingly misled the entry clearance officer to gain entry to the United Kingdom but also Article 45(1) of the EC – Bulgaria Association Agreement was the rule of substantive law on the basis of which the merits of application for establishment fell to be assessed and which was allegedly infringed in Miss Kondova’s case. There was no standstill clause contained in that Article.

15.
There is a passage in point in the judgment of Sedley LJ in Sonmez v Secretary of State for the Home Department [2009] EWCA Civ 582 dealing with the argument that the ex turpi causa principle applied when he said:

“22. Here, correspondingly, it is common ground that such controls as public policy requires are contained in the Immigration Rules themselves. This seems to us to be a proper, indeed a compelling, approach to what is at root an issue of policy rather than of law. One looks first to see whether the applicable code anticipates claims based in any measure on illegal conduct. If it does, there is no need for a default rule which, among other things, constitutes an unsatisfactorily blunt instrument – for example in a case where an overseas student with a limitation of 20 hours' work a week on his visa has averaged less than this but has worked sometimes a few hours more.

23. Here, as the Home Secretary and the appellants agree, rules 4 and 21 of HC 510 recognise that there will be differing degrees of merit among applicants. In particular, rule 4 spells out that, in deciding whether to grant a variation of leave, "account is to be taken of all the relevant facts". This alone will bring into account any breach by the applicant of his or her visa conditions; but, every bit as importantly, it will do so in a fashion which is sensitive to degree and circumstance and does not equiparate the casual transgressor with the systematic cheat. ”

16.
The position is that while HC 510 does contain provisions for general grounds of refusal, unlike more recent immigration rules, those general grounds do not specify refusal on current paragraph 320(7A) or 322(1A) grounds.

17.
In these circumstances I am satisfied that the First-tier Tribunal judge made an error on a point of law in his determination of the appeal which I set aside. I re-make the decision by allowing the appeal to the limited extent that the decision of the respondent whereby she excluded the appellant from the benefit of the standstill clause and refused to consider the application under HC 510 was not in accordance with the law so that the application remained outstanding before her to be determined under HC 510 in accordance with my findings and those of the First-tier Tribunal judge in relation to the lack of personal dishonesty on the part of the appellant.

Signed

P A Spencer

Judge of the Upper Tribunal

Immigration and Asylum Chamber