IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber)

THE IMMIGRATION ACTS

Akinci (paragraph 21 HC 510 – correct approach) [2012] UKUT 00266(IAC)

Heard at Field House	**Determination Promulgated**
On 3 July 2012	.....

Before

MR JUSTICE BLAKE, PRESIDENT

UPPER TRIBUNAL JUDGE DAWSON

Between

MR MUHAMMED AKINCI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Miss G S Peterson, Counsel instructed by CK Solicitors

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

The correct approach to paragraph 21 of HC 510 invites consideration of the following matters:

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. 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.

DETERMINATION AND REASONS

1.
Mr Akinci is a national of Turkey, born 13 September 1990. He appeals with permission the decision of First-tier Tribunal judge Alakija who dismissed his appeal against the Secretary of State's decision of 4 July 2011 refusing to vary his leave to remain. He had applied to establish himself in business under the Turkey- European Community Association Agreement ("the Ankara Agreement").

2.
Mr Akinci proposed to buy a kebab takeaway business in Minehead and in support of his application submitted evidence of his proposed investment including, unaudited accounts of the business for the year ending April 2011, a business plan and a rental agreement. He had arrived in the United Kingdom as a visitor on a visa issued in Istanbul on 5 January 2011. His application for further leave to remain was made on 13 June 2011.

3.
The Secretary of State gave a number of reasons for refusing the application:

i)
The credibility of the application was undermined by the price he intended to pay, representing approximately the annual profit together with the rent he would be required to pay to the vendor. It was considered the purchase price (£12,000) was not a proportionate amount to invest in comparison to the turnover (£67,711).

ii)
The appellant had declared his job in Turkey to be that of an engine technician on his entry clearance application form, however he relied on a CV showing that he had been involved in the catering field since leaving college in 2006. This gave rise to the concern that the appellant was not qualified to operate "a busy food takeaway business in the UK".

iii)
It was not accepted that the appellant's English language skills were sufficient to undertake effective training or that he would be able to run such a business.

iv)
Certificates he relied on as evidence of his skills from Turkey were not evidence of recognised food industry certificates.

v)
There were doubts about the evidence produced in support of the appellant's planned investment.

4.
The judge heard evidence from both the appellant and the vendor and made these observations:

i)

It was clear the appellant had not undertaken any in-depth market research himself.

ii)
He would not take a wage from the business in its start up period.

iii)
He had very little idea of his business plan and his proposals for increases in staff and equipment were unrealistic during the current economic climate.

iv)
There was inconsistent evidence over the appellant's relationship to the vendor, Mr Altinok.

v)
The appellant had not come here with the intention of staying for only nine days.

vi)
The profit made in the previous year by the vendor was without the increase in rent the appellant would be paying or the increase in other overheads and costs envisaged.

vii)
The business was not a viable proposition to support the appellant who may have to rely on other employment or public funds.

viii)
The appellant had stated he would employ four people in addition to himself giving a salary bill of £60,000 which would turn the profit made by the vendor in the preceding year into a loss unless there was a substantial increase in turnover.

5.
The judge concluded with these remarks:

"I do not accept the suggestion that the appellant should be given 12 months to see if he can make a go of the business and for the decision to then be reviewed particularly when it is obvious from the start that it cannot succeed on the basis of the information provided by the appellant himself."

6. Ms Peterson relied on a skeleton argument as the basis of her submissions. It had been drafted by other counsel and used as the application for permission to appeal. It is argued that:

i. The judge had failed to make relevant findings with reference to paragraph 21 of HC 510, the Immigration Rule relevant to Ankara Agreement cases.

ii. The judge had misunderstood the effect of the Rule based on the evidence thar the appellant would not take a "wage" until the business settled down. Para 21 does not require that a person must support himself from wages from the business, he should be able to support himself from the profits of the business which may accrue after the business has been in operation for some time.

iii. An assessment was also required of the appellant's financial position including his accommodation arrangements in determining whether he was able to support himself without disguised employment.

iv. The wrong approach was taken on the impact of the appellant's oral testimony as to the number of people he intended to employ and their compensation based on the accounts for the preceding year rather than anticipated prospective future profits.

7. The Secretary of State opposed the appeal in a r.24 response. Before hearing from her we drew the parties' attention to the Secretary of State's instructions on how her staff should deal with applications under the Turkish EEC Association Agreement.

8. We announced our decision that the judge had made a material error of law in the way in which he had considered the evidence before him. His decision would be set aside and required to be re-made. We now give our reasons for that conclusion.

9. It is settled law that the 1972 Immigration Rules (HC 509 and HC 510) are the provisions applicable to Turkish nationals who can rely on Article 41(1) of the Additional Protocol to the EEC – Turkish Association Agreement in order to benefit from the standstill clause. These rules are considerably more favourable with respect to migration for business purposes than those prevailing today: (see Savas (external relations) [2000] EUECJ C-37/98 and Oguz (external relations) [2011] EUECJ Case C-186/10).

10. HC 510 contains the Rules as to the practice to be followed in the administration of the Immigration Act 1971 for regulating control after entry. Paragraph 21 is in these terms:

" 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 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 12 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 ."

11. Although the Secretary of State expressed concerns about the credibility of the appellant, there has been no challenge to the application on the grounds of abuse of rights which might otherwise disentitle the appellant to rely on Community law and the substantive rights arising under the Ankara Agreement. It is clear from the decision in Oguz that the concept of abuse of rights is a narrow one defined according to Community law principles, and it is not engaged simply by virtue of the fact that claimant was admitted as a visitor.

12. The issue at the heart of this appeal is the viability of the business. This is largely a matter of objective evaluation of the business plan, but credibility may be an issue as to whether the claimant really intends to do what is proposed in the plan. The Tribunal has recently considered how to assess cases relying on plans prepared in identical terms for a wide variety of applicants. In Baylan (Turkish ECAA – "identical" applications) [2012] UKUT 83 (IAC) the head note reads:

“ In dealing with Turkish ECAA cases, decision makers must bear in mind the guidance given in EK (Ankara Agreement – 1972 Rules – Construction) Turkey [2010] UKUT 425 (IAC).

Identicality or near identicality in Turkish ECAA applications is not of itself a reason to find an applicant cannot succeed. However, it is apparent from the wording of paragraph 21 of HC 510 and the underlying objective of the Association Agreement that the business plan must be shown to be viable in the context of an applicant’s own personal circumstances .”

13 . EK (Ankara Agreement – 1972 Rules – Construction) Turkey [2010] UKUT 425 (IAC) has this head note:

“ 1 . There is nothing in the 1972 Immigration Rules (HC 510) that provides that a person who cannot come within one of the categories of the Immigration Rules is to be refused an extension of stay for that reason alone. Rule 4 set out the ‘main categories’ of people who may be given leave recognising the possibility that there are other categories not specifically set out that can be dealt with on a discretionary basis. Accordingly it was open to the Home Office to grant an extension of stay as a businesswoman to somebody who had entered as an au pair. The finding in OT (Turkey) [2010] UKUT 330 (IAC) that HC 510 reckon that in switching to business status by anyone other than a visitor is not considered correct. (See also now LE (Turkey) [2010] CSOH 153).

2. Paragraph 28 of HC 510 does not require a person who had been given leave as a businessman to demonstrate as a pre-condition for the exercise of discretion that in each or any year in which they had been given leave in that capacity they had complied with the particular requirements of paragraph 21. Those requirements are directly relevant only to the first application for permission to remain and the first extension of stay.

3. There is no precise code in HC 510 distinguishing between maintenance and accommodation and precluding third party contributions to living expenses .”

14. Paragraph 21 covers two sets of circumstances. The first is where someone proposes to set themselves up in business and the second is where it is proposed they will become partners in a new or existing business. The Rule is expressed in broad terms in the context of an approach that any application is to be considered on its merits. Permission is stated to depend on a number of factors which include:

i. evidence that the applicant will be devoting assets of his own to the business, proportional to his interest in it;

ii. that he will be able to bear his share of any liabilities the business may incur;

iii. that his share of its profits will be sufficient to support him and any dependants;

iv. the applicant’s part in the business must not amount to disguised employment;

v. and it must be clear that he will not have to supplement his business activities by employment for which a work permit is required.

There are additional requirements where an applicant intends to join an existing business:

vi. audited accounts should be produced to establish its financial position

v. together with a written statement of the terms on which he is to enter into it;

vi. evidence should be sought that he will be actively concerned with its running, and

vii. that there was a genuine need for his services and investment.

15. In the appeal before us the appellant proposed to acquire a business and therefore the factors to be considered are those set at (i)-(v) above.

16. As the Upper Tribunal observed in EK :

“23. In 1973 the Rules themselves were an open textured exercise in discretion in the round having regard to the general policy and particular factors identified; so was the practice in applying them…

24. … It was certainly the case in 1972 and for a number of years thereafter that the Home Office recognised that a business often needed some time to turn a profit and losses in the early years were not inconsistent with the business that met the policy and purpose of the Rules in general. The case was always considered in the round. In cases of doubt a further extension of limited leave was often given”.

17. The Secretary of State’s understanding of the requirements of paragraph 21 is set out in her extensive instructions to her staff in section 6 of the Immigration Directorate Instructions. These do not have the force of law, but nevertheless they have a legitimate impact in that it would be wrong for a judge to reach a decision in ignorance of them (see ZH (Bangladesh) v SSHD [2009] EWCA Civ 8; [2009] Imm AR 450).

18. Two aspects of these instructions require comment. At 4.3.2 it is stated:

“4.3.2. Realistic business proposal

A business plan or clear statement of intention setting out the business proposal and what the applicant will actually be doing is essential. This should include the following:

◦
An executive summary of the business proposal

◦
O utline of marketing and sales strategy

◦
Outline of operations – business premises to be used, any production facilities, IT systems etc

◦
T imetable for establishment

◦
F inancial forecasts including;

- d etailed breakdown of set-up costs of the intended business

- proper understanding of practical and financial requirements for establishment in the UK

- projections regarding performance over the first 12 months of operation which takes account of all potential expenses (such as overheads, administration, and marketing) and which convincingly demonstrates a reasonable chance that profits will be sufficient to maintain the applicant and any dependants over that time.

It is important that if required any applicant is able convincingly to demonstrate an understanding of any written evidence submitted on his behalf and will be able to justify the projected figures given above.

When, for example, it is apparent that the individual does not match up to the profile suggested by a pro forma business plan which may have been prepared by another party, it would be appropriate to discount such a plan in the overall assessment of the application. An inability to demonstrate understanding of the plan would cast doubt on whether the applicant could be expected in practice to put it into place. However it would not be impossible to demonstrate compliance with the rules when an application is prepared in conjunction with another party and contains similarities to other plans previously or similarly submitted ."

19. Whilst the suggested evidence to be provided in support of an application is useful as a means to satisfying the Secretary of State of the application, the expectation that the applicant "is able convincingly to demonstrate an understanding of any written evidence" sets the standard too high and does not represent the approach applied in 1972 which is the acid test. An applicant may have a clear idea of what he plans to do but may not have sufficient sophistication to explain the way in which his ideas have been expressed by a business adviser. He does not have to be a financial expert and in a case of doubt, clarification can be provided if needed and the adviser could be called to give evidence if matters are in doubt.

20. The second point relates to the instructions regarding the ability of an applicant to bear his share of any liabilities and to support himself. Para. 4.4.2 includes the observation:

" **Evidence that the applicant can bear his/her share of liabilities**

…Liability will also be linked to the level of financial risk that the applicant takes by setting up and investing in the business. Individuals who risk their own money by, for example, buying assets needed for the job and bearing the running costs and paying for overheads and large quantities of materials, are deemed to be taking a financial risk. Liability arises from the possibility that these investments will not be matched by the level of profit made. Financial risk could also take the form of quoting a fixed price for a job, with the consequent liability of bearing the additional costs if the job overruns.

Of relevance to being able to bear liabilities will be the value of the business's fixed assets, the amount of money invested in the business and its expected/actual turnover and profit, other funds available to the applicant and the level of business insurance cover that the applicant has in place.

Whilst debt represents a liability it is not always necessary for an applicant to be able to show that he can meet this debt instantaneously, particularly if the debt is a relatively small amount in the context of the business. It would be acceptable for the applicant to show that his/her business is likely to eradicate the debt from profits of the business in proceeding years .",

and at 4.4.3:

"Evidence of sufficient profits to support applicant and any dependents

The income required for an applicant to realistically maintain and accommodate themselves and any dependants without recourse to employment should be assessed on a case by case basis, taking any relevant factors into account, and bearing in mind that income derived from other sources, including benefits (see section 4.4.3.1), should not be included. This includes anything earned by dependants of the primary applicant.

Applicants need not have generated the level of profit required to maintain and accommodate themselves solely from the business throughout the first two years of their stay, while the business was being set up (although they must be able to demonstrate how, in the absence of such profits, they have maintained themselves in that time without recourse to employment), but the decision maker must be satisfied that a sufficient level can be generated consistently in the future in order for further leave to be granted.

…"

It is significant that the Secretary of State realistically acknowledges that businesses may not turn a profit immediately and this reflects a valid factor in assessing any plan.

21. In our view the correct approach to paragraph 21 of HC 510 invites consideration of the following matters:

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 a 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 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.

22. With these observations in mind we turn to the determination before us. The judge's principal finding was that the business as envisaged by the appellant in his oral evidence would not be a viable proposition sufficient to support him with the consequential finding that he might have to resort to reliance on employment or public funds.

23. Two aspects of the case particularly influenced him in his conclusions. The first was an increase in the rent the appellant would need to pay by virtue of the vendor granting him a sub-lease. The uplift was to be from £5,880 to £7,200. In the context of the turnover recorded in the accounts (£67,711) and that anticipated by the appellant in his first year of trading (£104,400), this was hardly material.

24. The second aspect related to the anticipated salary bill. According to the projected profit and loss set out in the business plan, in the first year the appellant anticipated a net profit of £14,341 based on the above turnover and a payroll of £26,472. A breakdown of this provides for a payment to the appellant per annum of £9,000 and the balance to three other members of staff. According to the record of proceedings the appellant was cross-examined in some detail. As to how many staff he intended to employ, he answered that it was then three but he wanted to employ two more. When asked how much each would receive he indicated £15,000. The Presenting Officer put the total therefore at £60,000. It is not clear how he arrived at this arithmetic. When challenged over this additional cost the appellant acknowledged he could make a loss but this followed the earlier questions in which the appellant had responded that the increase in staff would help the business grow.

25. The judge at [19] to [21] applied the additional staff projected staff costs to the historic figures and made no finding whether the increase in staff would result in a substantial increase in turnover. This was an error. What the judge should have done was to take the projections in the business plan and then decide whether they were realistic having regard to the historic figures. Thereafter he should have considered whether the further expansion plans identified by the appellant in cross-examination would result in an even greater increase in profit to that originally envisaged.

26. The judge also erred in failing to identify what funds the appellant would need for his support. It is difficult to see how there could be an informed assessment of the ability of the business to provide for the appellant's support without knowing what those costs would be. There was evidence before him that the appellant was living rent free with a friend and could have recourse to his business to feed himself. His outgoings were thus likely to be very modest. The judge also appears to have given weight at [15] to the proposition advanced by the presenting officer that the fact that the appellant was not intending to draw a salary in the initial period meant he could not meet the rules. As we have explained this is not a correct analysis.

27. We conclude that the judge made material errors in his approach to the assessment of evidence before him and failed to take material matters into account. We therefore set aside the decision that requires re-making.

28. It should have been obvious to the appellant and his advisers that, once permission to appeal had been granted, up to date evidence as to how the business was proceeding would have been highly material to the eventual outcome. If the business was expanding according to plan then the judge's pessimistic conclusions may well be shown to be unfounded.

29. Despite a clear indication in the directions that the Upper Tribunal would seek to re-make the decision without a further hearing (in such an eventuality), there was no new evidence before us. This was all the more surprising in the light of the information Ms Peterson gave us instructions that the first year accounts were ready and were helpful to the appellant.

30. Our preference was to re-make the decision forthwith, however we were unable to do so by the failure to serve the relevant evidence. The appellant has not been well- served by his advisers. He will now to have to face the costs of an additional hearing and consequent delay.

31. It is not the ordinary practice of the Upper Tribunal to remit cases to the First-tier Tribunal. In the great majority of cases, no further disputed evidence is needed if decisions are to be re-made and if such evidence is served timeously, the Tribunal will normally be able to go on and consider it. This is not possible in the present case and inquiries have revealed that the First-tier hearing centre will be

able to list and determine this appeal much more speedily than the state of the Upper Tribunal's lists permits. We have particular regard to the over-riding objective of efficient disposal of appeals and also the fact that the issue in dispute is the central question of fact in the appeal that both parties may want to explore.

32. In these circumstances we conclude that the appropriate course in all the circumstances is for the appeal to be remitted to the First-tier Tribunal for there to be a careful assessment of all the evidence relied on by the appellant if the matter remains disputed. If the appellant has up to date information as to the progress of his business he should serve it promptly on the respondent. He would also be advised to send in up to date information about his living expenses and resources.

33. We therefore set aside the decision and as indicated above remit the appeal to the First-tier Tribunal at Newport for the decision to be re-made in accordance with this determination.

Directions

34. We make the following further directions:

(i) The appeal will be heard at Newport at 10:00am on Monday 23 July 2012 with a time estimate of 2 hours

(ii) Not later than 10 days from the date of the sending out of these directions the appellant and all his representatives are directed to ensure that any additional evidence on which they wish to rely is served on the respondent and a copy sent to First-tier Tribunal.

(iii)
The appellant should inform the First-tier Tribunal whether he needs the services of an interpreter within the same period of 10 days.

(iv)
The respondent should respond to any material served on it within a reasonable time before the hearing.

(v)
If the appeal is no longer opposed or either party concludes that the time estimate should be significantly varied the First-tier Tribunal must be informed promptly.

Signed Date: 12 July 2012

Upper Tribunal Judge Dawson