Upper Tribunal
(Immigration and Asylum Chamber)

Baylan (Turkish ECAA –"identical" applications) [2012] UKUT 83 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 30 January 2012	

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Before

UPPER TRIBUNAL JUDGE STOREY

Between

ENSAR BAYLAN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr M Aslam of Counsel instructed by UK Immigration Legal Services

For the Respondent: Mr G Saunders, Home Office Presenting Officer

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 in itself a reason to find an applicant cannot succeed. However, it is apparent from the wording of paragraph 21 of HC510 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.

DETERMINATION AND REASONS

1. The appellant is a citizen of Turkey. He entered the UK on 19 October 2007 having been granted entry clearance as a student. He was subsequently granted extensions in the same capacity until 11 May 2011. On 10 May 2011 De Silva Ltd applied on his behalf for leave to remain to establish himself in business under the Turkey – European Community Association Agreement (Ankara Agreement). He had not completed the application himself. Documents relating to his business plan ran to 17 pages. The basis of his application was that he wished to commence business as a rickshaw or pedicab driver in Central London. His application was refused by the respondent on 16 June 2011. The respondent considered that the appellant had failed to show his business plan represented a

genuine business proposal from himself because it was identical to three other applications received having the same (17-page) supporting documentation. He appealed to the First-tier Tribunal (FTT). His main contention was that “such similarities cannot constitute grounds for refusal”. His witness statement said he did not know his business plans were identical to others submitted to the Home Office. He gave evidence during which he explained his business plan in more detail. He also called a witness, a Mr Dogrul, who said he had been a pedicab driver for one and a half years and had made £13,000 in his first year. On 15 August 2011 First-tier Tribunal Judge Brenells dismissed his appeal. The judge observed that the appellant stood to benefit from the “standstill” clause such that he fell to be considered not under the stringent Immigration Rules in force presently, but under those in force on 1 January 1973, as set out in HC 510 Statement of Immigration Rules of Control after Entry laid before the House of Commons on 23 October 1972 HC 510, paragraph 21 of which provides:

“People admitted as visitors may apply for 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.”

2. Nevertheless the judge considered that the appellant failed to meet those requirements. Whilst disagreeing with the respondent that the identicality of the appellant’s application with three others was not in itself a valid reason for refusing his application, the judge considered his plan as explained in evidence had a number of flaws. First, contrary to his plan stating he had already identified some potential customers, it was clear he had not. Second, in terms of the identity of potential customers, the appellant had said that some of his customers might be commuters as distinct from tourists, whereas there was no credible evidence to support that. Third, his own claim in his cash flow estimate (which indicated that November and December were likely to be his busiest months) was at odds with the evidence of his own witness, Mr Baylan. Further, his own claim that he would buy a second pedicab and employ a driver was not supported by Mr Baylan’s own evidence that after eighteen months as a driver he still worked on his own with one pedicab only. Fourth, the appellant’s oral evidence about Mr Baylan not having any previous cycling experience was at odds with what he had claimed in his business plan. At paragraph 21 the judge concluded:

“Given the Appellant’s lack of experience in his chosen field of activity, the lack of evidence as to his physical ability to move a pedicab for long hours around Central London and the errors and misstatements in his business plan, and on the totality of the evidence before me, I find that the Appellant has not discharged the burden of proof which is on him. The reasons given by the

Respondent justify the refusal. Therefore the Respondent's Decision is in accordance with the law and the applicable Immigration Rules."

3. The judge went on to reject the appellant's Article 8 grounds of appeal.

4. The grounds of appeal to the Upper Tribunal were threefold. First it was contended that the First-tier Tribunal Judge had erred in that two out of three reasons the judge gave for finding the appellant did not meet the requirements of paragraph 21, (namely (i) lack of previous experience and (ii) lack of requisite physical ability) had not previously been raised by the respondent and in the interests of fairness the appellant should have been given an opportunity properly to address them. Second the point was made that neither of these reasons were specified as criteria in paragraph 21. Third, it was argued that the judge was wrong to treat lack of previous experience as an obstacle to becoming a pedicab operator in Central London as one can learn the job and the appellant's physical ability had been attested to by a letter from Dr Seymenogh dated 4 May 2011.

5. I consider that the judge's decision was not vitiated by legal error.

6. Before turning to the grounds I should note first of all one point of fact. Although the respondent's refusal decision does describe the appellant's ECAA application as being "identical" to that of three other applicants, it does elsewhere accept that a few of the figures differ very slightly. The latter indication is correct: there were minor differences in some of the figures.

7. I need next to remind myself of the legal approach that is required in determining Turkish ECAA appeals and of two points in particular.

8. First, it must always be borne in mind that the legal requirements under the Turkish ECAA regime are far less stringent than those applying to be businessmen under para 209 of the current Immigration Rules HC395 and are also different from those applied in the case of EC Association Agreements in respect of Bulgaria and Romania (para 222). That is perhaps not surprising given that the Turkish ECAA regime entitles applicants to benefit from Article 41(1) of the Additional Protocol to that Agreement and its "standstill" clause which bars the UK from imposing conditions for business applicants less favourable than those which were in force, some 39 years ago, when the UK became bound by the Agreement in 1973: see Case C-37/98 R v SSHD, ex parte Savas [2000] 1 WLR 1828; Case C-16/05 R (on the application of Tum and Dari) v SSHD [2007] ECR I-7415, [2008] 1 WLR 94. The aim of the Agreement is essentially economic: it is "to promote the continuous and balanced strengthening of trade and economic relations between the Contracting Parties, which includes, in relation to the workforce, the progressive securing of freedom of movement for workers and the abolition of restrictions on freedom of establishment and on freedom to provide services, with a view to improving the standard of living of the Turkish people and facilitating the accession of Turkey to the Community at a later date" (Oguz (External relations) [2011] EUECJ C-186/10, 14 April 2011) (Advocate-General Kokott, para 4).

9. Second, as emphasised by the Tribunal in EK (Ankara Agreement - 1972 Rules - construction) Turkey [2010] UKUT 425 (IAC at para 21), 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". There are significant differences in the HC510 Rules and the ones in force since around 1995. At para 22 EK notes three in particular:

"… First, there is nothing in 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. Indeed

paragraph 4 of HC 510 says in terms that the following paragraphs 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. Secondly, paragraph 28 does not in turn 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 have been given leave in that capacity they had complied with particular requirements of paragraph 21. Those requirements are only directly relevant to the first application for permission to remain as a businesswoman and the first extension of stay thereof. In terms the words look to the future “will” rather than the past “have”. Thirdly, there is no precise code in HC 510 distinguishing between maintenance, accommodation and precluding third party contributions to living expenses.”

10. Against this background, I turn to the grounds, the first of which concerns procedural fairness. I do not find it is made out. It is true that the respondent in his refusal letter had not raised either the issue of the appellant having previous cycling experience or of his requisite physical ability, but both had been addressed by the appellant himself in his business plan which described him as “an experienced cyclist”. The judge clearly put the appellant on notice that he wished further information from the appellant as to various aspects of his business plan and in response the appellant’s own evidence (in answer to questions from Mr Aslam) covered, inter alia, the issues of his experience and ability. He said he had cycled previously usually in parks, that he had not done a physically demanding job previously and that although he could offer no assurance that he could do a physically demanding job, he trusted himself to do it. Both representatives then made submissions covering, inter alia , those two issues. Hence there was clearly no procedural unfairness and indeed Mr Aslam conceded as much at the end of his submissions.

11. As to whether the judge in basing his decision on experience and requisite ability had taken irrelevant factors into account (the second ground), I agree with Mr Saunders that paragraph 21 mandates the decision-maker to take into account a wide (non-exhaustive) range of factors and emphasises the need for the applicant to demonstrate that his proposed business plan is viable. Viability is clearly also part of the general policy underlying the exercise of discretion under this paragraph. Particularly in the case of an application based on sole self-employment, it is inevitable that ability is to be regarded as a relevant factor and that where, as here, the proposed activity (rickshaw-driving/"pedicabbing") involves physical exertion, that physical ability should be regarded as particularly relevant. The grounds contend that in assessing the appellant’s ability, the judge failed to take into account that the documentary evidence submitted with the business plan included a certificate issued by Bugbugs certifying that the appellant had completed level 3 of the National Cycling Award Scheme and a letter of Theory Test pass from the London Pedicab Operators Association (LPOA). However, the judge specifically noted these items of evidence (see paragraph 5) and given that the appellant’s documentation was near-identical to that submitted by three other applicants, he was quite entitled to test the appellant’s evidence to ascertain whether he had the abilities and proficiencies these described. He cannot be criticised for seeing the key to establishing the truth as being the appellant’s oral testimony.

12. As regards the third ground, I would agree with Mr Aslam that previous experience for such an occupation cannot be treated as an indispensable requirement, but I disagree that the judge regarded it as such. The judge did no more than treat it as a relevant and significant factor – and it was a factor on which the appellant himself in his business plan and oral evidence had sought to rely. The judge’s approach was to look at matters in the round.

13. I note further that the grounds fail to mount any challenge to the additional reason the judge gave for dismissing the appeal, namely “errors and misstatements in his business plan”. Neither the grounds nor Mr Aslam’s submissions furnished any effective reasons for considering the judge’s analysis of these was flawed. (One obvious oddity about the plan was that despite stating that the business would largely revolve around the tourist trade, the appellant had identified his busiest months as likely to be November and December.)

14. Although neither party referred me to it, I have also given consideration to whether the judge’s assessment of this case was consistent with the guidance given in EK (see above para 9). Even though the judge does not appear to have taken into account, as EK requires, that para 21 involves an “open textured exercise of discretion”, it is clear from the particulars of the appellant’s application and appeal that he could only succeed if able to establish that his business plan was viable and in my judgement the judge was entitled to find that the appellant had not established that.

15. Neither the appellant’s grounds of appeal to the Upper Tribunal nor Mr Aslam’s oral submissions sought to pursue the appellant’s Article 8 grounds, which the First-tier Tribunal had rejected. I need only record that I see no error in the judge’s assessment at paragraph 22 that Article 8 was not engaged.

16. It seems to me that even if I had found a material error of law, I would have had to consider an additional problem with the appellant’s business plan which, as it had been raised by the respondent in the refusal letter, I would also have needed to address, namely the absence in the plan of any specific explanation of how (to use the wording of paragraph 21 of HC 510) “his share of its profits will be sufficient to support him and any dependants”. The judge does not record any evidence or submissions bearing on the matter, nor is it a matter addressed in the appellant’s witness statement. On the evidence before me I would have treated the lack of any particulars showing that his plan was consistent with his own personal circumstances as a significant factor to be taken into account in the paragraph 21 consideration.

17. Given that the Tribunal has recently encountered a number of Turkish ECAA cases in which the respondent has relied on the existence of identical or near-identical applications, it may assist to state the following.

18. First, judges should remind themselves of the points made at paras 8 and 9 and of the guidance given in EK in particular. Second, it will be important to check whether the applications are indeed identical. As already noted, in this appellant’s case the respondent was not strictly correct to say (as was said at one point) that his and three other applications were identical: there were some differences, although relatively few in number and significance; but it cannot be assumed that this will always be the case.

19. Third – and by way of approving the reasoning of the FTT judge in this case – identicality or near-identicality in an application should not be treated as in itself a reason to find an applicant cannot succeed in an ECAA application. It is a fact of life that persons embarking on small businesses will often model (and will often be encouraged by professional advisers, to model) their applications on similar business proposals which have succeeded and been proven to be viable. It is also a fact of life that when seeking to commence such a business an applicant may rely on professional advice and leave the drafting of particulars to others. If the application is genuine, i.e. a bona fide and realistic proposal for self-employment that the applicant/appellant intends to undertake and deliver, the fact that others are applying for a similar purpose and plan should make no difference.

20. Fourth, however, it is apparent from the wording of para 21 of HC510 and the underlying objective of the Association Agreement (that of promoting economic activity; see above para 8), that the business plan must be shown to be viable in the context of an applicant's own personal circumstances. The rationale of the Turkish ECAA is to facilitate genuine economic activity. Thus under para 21 it must not amount to disguised employment, so the evidence needs to show that it will be self-employment. The appellant needs to pinpoint the assets of his own that he will bring to the business. His own ability to shoulder any liabilities is also relevant. Further (as might have become relevant in this case had I found a material error of law), an applicant needs to show that his share of its profits will be sufficient to support him and any dependants. In general, and bearing in mind the guidance given in EK , this entails that his application must make clear what are his personal financial circumstances (which may include third-party support: see EK) and that his share of the profits will suffice to ensure he can maintain himself and any dependants. By their very nature such requirements call for the production of personal financial particulars.

21. It can be no surprise to applicants that their business plan needs to be tailored to their specific circumstances. That is made clear in the relevant Immigration Rules. And in terms of processing applications, the UKBA website makes clear what caseworkers are instructed to look for. Chapter 6 Section 8 of the Business Applications under the Turkish –ECAA, dated May 2011 includes the following entries:

"4.2.1. Is there a genuine intention to set up the business?

See section 4.3 for further guidance.

It may be the case that the business proposal appears on paper to meet the minimum requirements of the 1973 business provisions i.e. the applicant has sufficient funds, a good projected turnover and profit, the proposal has been researched etc, but each case is to be considered on its merits and there may be reason to believe that the applicant does not intend to set up, or is not capable of running, the proposed business.

For example, there may be a lack of relevant qualifications or experience, depending on the nature of the business the applicant's age may suggest he/she is unable to run the business or the applicant's conduct may suggest that the application does not represent a genuine intention to establish.

4.2.2. Is it a business of the kind covered by the 1973 business provisions?

See section 4.4 for further guidance.

The minimum requirements of the 1973 business provisions are that the applicant has sufficient funds proportional to his interest in the business which he intends to invest in the business, is able to show that s/he can bear his/her share of any liabilities that the business may incur, can show that the business profits will be sufficient to support him/her and any dependants and that the business proposal does not amount to disguised employment. In addition to these requirements an applicant who is joining an existing business will need to provide the business accounts for previous years, a statement of the terms on which s/he will be joining the business, evidence that s/he will be actively concerned with the running of the business and evidence that there is a genuine need for his/her services and investment.

The intention behind the 1973 business provisions was to provide a basis for applying for leave for those who wish to establish a business of the kind that involves genuine financial investment and risk on the part of the applicant. If an application is based on a business that is unable to meet the

minimum requirements of the 1973 business provisions because it does not represent genuine investment and risk, even if the proposal itself is genuine, the application should be refused. “

22. By referring to these entries, I do not intend to make any judgment on whether they fully reflect correct legal principles to be applied in ECAA cases; my point here is simply that the respondent, by placing them in the public realm, makes unequivocally clear to applicants that a Turkish ECAA business proposal must be specific to an applicant’s personal and financial circumstances.

23. For the above reasons, the First-tier Tribunal judge did not materially err in law and his determination stands.

Signed Date

Upper Tribunal Judge Storey

Immigration and Asylum Chamber