Upper Tribunal
(Immigration and Asylum Chamber)

Dasdemir (1972 Rules – self-employment) Turkey [2013] UKUT 00121 (IAC)

THE IMMIGRATION ACTS

Heard at Field House

Determination Promulgated

20 February 2013

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Before

THE PRESIDENT THE HON MR JUSTICE BLAKE

DEPUTY UPPER TRIBUNAL JUDGE WOOD

Between

MR YUCEL DASDEMIR

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the appellant: Mr D Blum instructed by Rahman & Co Solicitors

For the respondent: Mr D Hayes, Senior Home Office Presenting Officer

(1) Self–employed persons were eligible for leave to remain under paragraph 21 of HC 510 if they made an investment in the provision of services of their personal skill provided that they were not engaging in disguised employment or would not have to supplement their business activities by taking employment for which a work permit was required.

(2) The distinction between employment and self-employment is a question of fact to be assessed in the light of the evidence as a whole. A relevant and potentially decisive issue is whether the person to whom services are provided controls the relationship.

(3) The UKBA May 2011 IDI accurately reflects the fact that a person may work part time for a number of employers and not be self employed.

DETERMINATION AND REASONS

1.
The appellant is a Turkish national born in 1981. He arrived in the United Kingdom in January 2008 and was given leave to remain as a student that was extended until 3 July 2010. On 31 July 2010 he applied for leave to remain to establish a Mexican restaurant business (El Pancho's) under the terms

of the Ankara Agreement applicable to Turkish nationals. The Secretary of State granted him leave to remain until 3 July 2013.

2.
On 21 January 2012 the appellant's solicitors wrote to the Secretary of State informing her that the appellant's business had been unsuccessful and had stopped trading the previous year. They explained that he was providing services as a self-employed chef to other businesses of a similar nature. The respondent asked for further data in June 2012 and indicated that the curtailment of his existing leave would follow in the absence of satisfactory evidence of the new arrangements.

3.
The respondent was not satisfied by the evidence submitted by the appellant and curtailed his leave to remain on 27 September 2012. On the same day she also took the decision to remove the appellant. The appellant appealed to the First-tier Tribunal.

4.
His appeal was heard by Judge Tipping who on 4 December 2012 dismissed it. Like the Secretary of State, the judge was not persuaded that the appellant's activities did not amount to disguised employment.

5.
The appellant was granted permission to appeal to the Upper Tribunal from Judge Tipping's decision. Essentially the questions before us are:-

i)
Did Judge Tipping's decision involve the making of an error of law?

ii)
If so was any error material to the outcome and therefore requiring us to re-make the decision?

iii)
If we were to re-make the decision on the basis of the material findings of fact by Judge Tipping and the evidence before him, would we come to a different conclusion?

The 1972 Rules

6.
It is well established that as a result of the standstill clause contained in Article 41 of the Additional Protocol to the Turkish Association Agreement with the European Community (the Ankara Agreement), that "the Contracting Party shall refrain from introducing between themselves any new restrictions on freedom of establishment and the freedom to provide services".

7.
The United Kingdom became bound by this obligation when it joined the European Economic Community (as it then was) in January 1973. At that time the relevant rules were contained in HC 510 promulgated in 1972. Rule 21 is headed "Businessmen and Self Employed Persons". It provides as follows:

"People admitted as visitors may apply for consent of the Secretary of State to 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 the 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 liability the business may incur and that the share of his profits will be sufficient to support him and any dependants. The applicant's part in this 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."

There are other provisions relating to joining established businesses under terms on which leave to enter or remain should be granted.

8.
The Upper Tribunal has made clear in its decision in EK (Ankara Agreement – 1972 Rules – Construction) Turkey [2010] UKUT 425 (IAC) that this is a broad rule to be interpreted in the round in the light of all relevant evidence. Further guidance was given by this Tribunal as to how to assess business applications in the case of Akinci (paragraph 21 HC 510 - Correct Approach) [2012] UKUT 266 (IAC).

9.
As the title to rule 21 suggests, it is possible for those who seek to remain in self -employment by providing services to come within the rule and it is not restricted to those who establish companies. There is no minimum financial contribution which must be brought into the proposed activity and it would appear from the decision of the Immigration Appeal Tribunal in Stawczykowska [1972] Imm AR at 220 that the provision of personal skill (in that case dress making) was an asset within the contemplation of the rule. It is equally clear, however, that the rule contains a clear prohibition on employment for which a work permit is required and the applicant's part in the business must not amount to disguised employment. The Tribunal noted with apparent approval the submission by the advocate on behalf of the claimant in that case:-

"The chief asset of a self-employed person is his skill… The criterion is whether the person is his own master or whether he has to work according to his employer's rules and on a fixed salary."

10.
The distinction between working for oneself and working for another is made in the current guidance on the application of the Ankara Agreement dated May 2011 and accessed 20 February 2013 on the UKBA website under the Immigration Directorate Instructions.

11.
Paragraph 4.2.3 of those instructions states as follows:-

"In some circumstances it may be apparent that the nature of the work being proposed is actually employment. Disguised employment in the context of the 1973 business provisions means a proactive attempt to present employment as self-establishment. For example, a claimed investment that amounts only to a transfer of money to the business owner and the applicant in practice is managing the business on behalf of the owner may amount to disguised employment. When disguised employment is identified the application should be refused.

If some or all of the following criteria apply, this indicates employment:

Applicant;

- works a set amount of hours;

- is paid by the hour, week, or month;

- will receive overtime pay or bonus payments;

- is “part & parcel” of an organisation i.e. is an integral part of an organisation; receives employee-type benefits from an organisation e.g. pension, access to grievance procedures etc;

- can at any time be told what to do e.g. where to carry out work or when and how to do work and can be moved from task to task.

The fact that an individual provides services for more than one person does not automatically mean that they are not employed. If the above indicators apply to each service being provided then the individual may still be an employee but with multiple employers rather than established in business.

When an applicant is found to be seeking or actually in employment it does not necessarily mean that the applicant is guilty of disguised employment: the applicant may genuinely believe that what they are doing represents running their own business. However, it does mean that the application will fail.
“

Although this guidance was not referred to by the judge below or in the submissions that we heard in this appeal, we consider it is generally helpful in identifying the distinction between employment and self-employment and can thus be employed as a legitimate aid to the scope of application of the rule. Further guidance as to the distinction between employment and self-employment in the context of employment law can be found in Stringfellows Restaurant Limited v Quashie [2012] EWCA Civ 1735 noting and applying the judgment of McKenna J in Ready Mix Concrete (South East England) v Minister of Pensions and National Insurance [1968] 1 QB 497 where the ‘control’ test is identified as a useful but not determinative pointer.

Curtailment of Leave

12.
What is before us is an appeal against a decision to curtail leave to remain. It is common ground that in 1972 there was a statutory power to vary leave by restricting its duration (Immigration Act 1971 s. 3(2)). We have not been referred to any provisions of the 1972 Immigration Rules concerned with curtailment, but Mr Blum has invited us to proceed on the basis that it was permissible to curtail leave in 1972 if a change of circumstances removed the basis of the claim to remain.

13.
The judge proceeded on the basis that the burden of proving that there had been such a change of circumstances lay on the respondent. In principle we agree but it was accepted by Mr Blum on behalf of the appellant that the Secretary of State was able to discharge to the appropriate standard the burden of showing there had been a change of circumstances in the present case since the granting of the leave to remain. The appellant said as much when informing the respondent that his earlier Mexican food business had failed. Mr Blum further accepted that in those circumstances, where the appellant was seeking to vary the activity for which he had been given leave to remain in the United Kingdom, that the burden of demonstrating that the new activity was indeed self-employment within the meaning of rule 21 and that the basis of his leave to remain had not been removed fell on him. We agree with the contention of counsel.

14.
This is not a points based application, and it was open to the appellant to submit to the judge evidence of ”any matter… relevant to the substance of the decision” even if that material was not before the Secretary of State at the time of the decision: see s.85(4) of the Nationality Immigration and Asylum

Act 2002. However, new material will only be relevant to the substance of the decision to curtail if it was either in existence at the date of the decision to curtail or came into being afterwards but relates to a question in issue at the time of the decision: see DR (ECO: post-decision evidence) Morocco* [2005] UKIAT 00038 (IAC).

The judge's decision

15.
In the light of the above, we conclude that it was for the judge to make an overall assessment of all the evidence before him and decide whether the appellant had established that his changed circumstances met the requirements of rule 21 or failed to do so because (whatever he may have believed) in reality he was in employment rather than self-employment.

16.
The documentary evidence before the judge showed that the appellant provided his services to three different Mexican restaurant businesses where he supplemented the regular work force on particularly busy days.

17.
The judge summarised the evidence before him at paragraphs 6 and 7 of his decision in the following terms:-

"6. The appellant's evidence is that, following the failure of El-Pancho's he set himself up as a self-employed chef, offering cooking services to restaurant owners. The three supporting witnesses confirm that the appellant works or used to work for each of them on a set basis each week. Mr Bilal, for example, owns the Mexican & Cuban Ltd Cucarachas in Battersea, and the appellant works for him there. Mr Bilal states that he employs two other chefs, and that the appellant works for him on Fridays and Saturdays when the restaurant is at its busiest. The appellant has similar arrangements for working for Mr Yildirim on Thursdays and used until March 2012 to work on Sundays for Mr Arslan. The appellant has produced certified accounts show a "net rental (sic) income" of some £10,000 for the year to 5 April 2012, and a copy of his tax return for the year.

7. In cross-examination, the appellant agreed that he had not been required to make any investment into the businesses for which he works, and that he does not share in profits. He pays for his own clothing and for his travel by underground to work. The appellant maintains no business bank account, and is paid by the day in cash by the restaurant owners for whom he works. Mr Bilal, Mr Yildirim and Mr Arslan confirmed the detail of the working arrangement they have or had with the appellant. They are all old friends of the appellants from Turkey. Mr Yildirim, for example, said that he had known the appellant since 1996, when the appellant was 15. The appellant works for him on Thursdays, for set hours. He works to Mr Yildirim's instructions, including the dishes to be prepared and the required quantity. Mr Bilal said at the hearing that he told the appellant where to work, when to come to work, and what to do. Mr Arslan said that it was for him to decide what hours the appellant should work and what he should do."

18.
The appellant had produced a bundle of invoices issued in his own name and home address for his services; he produced a certificate of public liability insurance policy from the 25 October 2011; he produced certificates of Health and Safety Training Courses he had undertaken in September 2009, personal bank statements and a business card.

19.
The respondent's case at the hearing was set out by the Immigration Judge at paragraph 8 of his decision and may be summarised:-

(i) The appellant's work has none of the characteristics of a business.

(ii) He has invested neither money nor physical assets in any current

business and has no liability for them.

(iii)
He has no business premises or business name, and does not maintain a

business bank account.

(iv)
He does not share in the profit for any of the businesses for which he now works.

(v)
He is not a self employed businessman but a part time employee who seeks to disguise his employed status.

(vi)
This conclusion is not affected by the fact that he has produced a business card, obtained a hygiene certificate, and provides his own work clothes.

20.
In the following paragraphs of his decision the Judge concluded:-

"9. I have considered the appellant's circumstances with care and in the round. I accept that the appellant has submitted a tax return as a self-employed person, but there is no evidence that HMR&C have carried out any investigations into this tax status. Mr Blum sought to persuade me that the appellant's circumstances are similar to those of a barrister, but I do not accept that, typically, a barrister (other than one who is employed) works part-time solely for two employers for the same set hours every week. By contrast to the appellant, a barrister in private practice must provide himself with business premises in the form of chambers.

10. For the above reasons, I am satisfied to the relevant standard of proof that the appellant is a part-time employee and no longer a self-employed businessman. It follows that the respondent has established that there has been a change in the appellant's circumstances sufficient to remove the basis for the appellant's leave to remain in the United Kingdom."

<u>The grounds of appeal to the Upper Tribunal</u>

21.
The appellant was granted permission to appeal on grounds lodged on 7 December 2012 in summary submitting that:-

(i)
The judge approached the appeal with a list of factors in mind that must be present in order for self-employment to exist.

(ii)

There is no legal requirement for a self-employed person to invest his money or other assets in their chosen area of work or for them to have business premises or for them to have a business bank account.

(iii)
The judge is obliged to approach each case on its own facts and take account of the particular nature of the appellant's claimed business.

(iv)
For this particular appellant there was little investment he could practically make. His business was based primarily on his skill and knowledge as a chef not on the purchase of expensive equipment or the significant other requirement outlay.

(v)
He did not need to have business premises or a separate business bank account.

(vi)
Contrary to the judge's claim that barristers must provide themselves with business premises in the form of chambers, there is no actual requirement for self employed barristers to be in chambers (or for a separate work bank account).

(vii)
The judge erred in failing to refer to the appellant's public liability insurance dated October 2011 or his business plan.

(viii)
Whilst the appellant did work set hours and followed the instruction of the owners of the restaurants in terms of what food he prepared, this did not bring the appellant's work within a relationship of subordination.

Error of Law

22.
We accept that as a matter of law, in the light of our analysis of rule 21 and the learning relating to self-employment, that there are no minimum requirements that must always be met, and submissions (ii) to (v) in the appellant's grounds above are accurate.

23.
However, we do not accept that the judge erred in seeking to impose a set of minimum requirements about the application and any misapprehension as to how barristers can operate as self employed persons is incidental to the decision; the judge was engaging with an analogy advanced by the appellant at the appeal below that was unhelpful in the context of the issues to be decided.

24.
The judge's decision and his recitation of the evidence demonstrate that he was alert to the central distinction between employment and self employment. The absence of the features noted by the respondent was relevant to the overall assessment but none was conclusive in itself.

25.
The critical issue was how far the evidence of how the appellant supplied his services to the three businessmen who owned the restaurants in question, informed as to the reality of the relationship. The judge's recital of the evidence suggests that:

(i) The appellant's actual work was no different from that undertaken by the full-time staff of the restaurants in question.

(ii)
The appellant worked for the same three businesses and at the relevant time only worked for those businesses.

(iii)
The appellant worked set days established regularly in advance for the businesses. There appeared to be mutuality of the obligation to provide him with work and for him to perform it on those days during the duration of the relationship.

(iv)
The appellant worked to the instructions of the business owners about what to prepare and where and when to prepare it.

26.
In our judgement the factors set out at [25] point towards a relationship of part-time employment, whatever the appellant intended the relationship to be. We observe that there was no evidence of advertising the appellant's services to the general public or other businesses or of discharging obligations to any business regularly worked for by providing substitute labour with the appropriate skills.

27.
We accept that the appellant provided his own clothes, had public liability insurance, received cash sums by way of gross remuneration on which he paid tax himself as a self-employed person and that he had skills as a chef of Mexican food. We were also informed that he did not receive holiday pay. Those are factors that point to some degree away from a contract of service. However, they are not unusual features of modest part time employment of very minimal hours with each employer and the tax status is not conclusive of the reality. In the circumstances they are not strong pointers to the reality of the relationship.

28.
The central submission for the appellant in this appeal is ground (viii) at [21] above. Relationship of subordination is taken from the decision of the Court of Justice in Case C-268/99 Van Roosmalen [1986] ECR 3097; [1988] CMLR 471 and Case C-268/99 Jany [2001] ECR 1-8615. The grounds assert that there was no such relationship in the present case, but it was precisely for the judge to make an assessment of fact as to whether the relationship the appellant had with each business was one of 'subordination' or 'control'. In our judgement, reading his decision fairly and as a whole, he found that they were. That was a conclusion that the judge was entitled to reach on the evidence before him. It is the conclusion we would have drawn ourselves on the same material.

29.
There was therefore no error of law in the making of this decision and certainly no material error that would have led us to exercise the statutory discretion to re-make this appeal. So far as this appeal relates to the decision to curtail leave is concerned, we dismiss it.

30.
However, we pointed out at the hearing that there was also a decision to remove the appellant taken at the same time as the decision to curtail. Such simultaneous decision-making appeared to be

inconsistent with the decision of the Tribunal in Adamally and Jaferi (section 47 removal decisions: Tribunal Procedures) [2012] UKUT 00414 (IAC) following and explaining the earlier decision in Ahmadi (s. 47 decision: validity; Sapkota) [2012] UKUT 147 (IAC).

31.
Mr. Blum asked permission to amend his grounds so as to appeal against the removal decision. This was not opposed by Mr Hayes, and nor did he oppose our allowing the appeal against this decision.

Conclusions

32.
The appeal against the curtailment decision is dismissed.

33.
Permission to appeal against the removal decision is granted. The appeal against this decision is allowed.

34.
It is open to the Secretary of State to make a fresh removal decision. If the appellant has any further information to bring to her attention as to the way he presently operates as a chef, he should supply it promptly.

The Hon Mr Justice Blake

Chamber President

25 February 2013