Upper Tribunal
(Immigration and Asylum Chamber)

R (on the application of Temiz) v Secretary of State for the Home Department IJR [2016] UKUT 00026 (IAC)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

Heard at Cardiff Civil Justice Centre

On 19 November 2015

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE QUEEN (ON THE APPLICATION OF MEHMET ALPER TEMIZ)

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Applicant: Mr J Walsh, instructed by Qualified Legal Solicitors

For the Respondent: Miss M Bayoumi, instructed by the Government Legal Department

JUDGMENT

Judge Grubb:

Introduction

1.
The applicant is a citizen of Turkey who was born on 7 February 1977. In these proceedings he challenges the decision of the Secretary of State taken on 16 September 2014 refusing to grant him leave to remain in order to establish himself in a business under the Turkey-European Community Association Agreement ("the Ankara Agreement") under paras 4 and 21 of Statement of Immigration Rules for Control after Entry (23 October 1972) (HC 510).

Background

2.

The applicant came to the United Kingdom on 22 October 2001 with leave as a student valid until 15 April 2002. His leave as a student was subsequently extended until 20 January 2005. His leave expired on that date although the applicant says that he was unaware of that until 2008 as he believed that his college was arranging for further leave.

3.
On 22 September 2009, the applicant applied for further leave to remain on compassionate grounds. That application was refused on 5 April 2011 and on 29 May 2012 the applicant was served with a notice of removal. His appeal to the First-tier Tribunal was heard on 23 July 2012 but dismissed. His subsequent applications for permission to appeal were refused by the First-tier Tribunal and the Upper Tribunal on 24 August 2012 and 12 November 2012 respectively.

4.
Removal directions were set for 12 December 2012 but prior to that the applicant submitted an application for leave, relying upon the Ankara Agreement, in order to establish a proposed business. A further application was made in February 2013. On 26 July 2013, the Secretary of State refused that application. The applicant sought reconsideration and his application was again refused on 28 November 2013. Permission to bring judicial review proceedings in relation to those decisions was refused by the Upper Tribunal on 9 April 2014.

5.
On 28 April 2014, the applicant made a fresh application for leave to remain on the basis of his proposed business relying again on the Ankara Agreement.

6.
On 16 September 2014, the respondent refused that application.

7.
A pre-action protocol letter was sent by the applicant’s representative on 29 October 2014 and the respondent replied on 25 November 2014. On 5 December 2014, these proceedings were filed challenging the decision of the respondent to refuse leave in order for the applicant to establish his business taken on 16 September 2014.

8.
Permission having been refused on the papers on 12 February 2015, following an oral renewal of the application for permission, HHJ Curran QC granted the applicant permission by order dated 7 May 2015.

The Applicable Rules: HC 510

9.
It was common ground between the parties that the applicant as a Turkish national seeking leave to establish himself in business fell within the so-called “standstill clause” in Art 41(1) of the Additional Protocol to the Ankara Agreement. As a consequence, it was also common ground that the applicant was entitled to have his application for leave decided under the Immigration Rules in force on 1 January 1973 the day on which the UK joined the European Economic Community. It was also common ground that the application for leave to remain had to be decided in accordance with paras 4 and 21 of HC 510 which were the relevant Immigration Rules in force on that date.

10.
Those Rules provide as follows:

“ **General considerations**

4. The succeeding paragraphs set out the main categories of people who may be given limited leave to enter and who may seek variation of their leave, and the principles to be followed in dealing with their applications, or in initiating any variation of their leave. In deciding these matters account is to be taken of all the relevant facts; the fact that the applicant satisfies the formal requirements of these rules for stay, or further stay, in the proposed capacity is not conclusive in his favour. It will, for example, be relevant whether the person has observed the time limit and conditions subject to which he was admitted; whether in the light of his character, conduct or associations it is undesirable to permit him to remain; whether he represents a danger to national security; or whether, if allowed to remain for the period for which he wishes to stay, he might not be returnable to another country.

….

Businessmen and self-employed person

21. People admitted as visitors may apply for the 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 its 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 proportion 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 time of stay if the conditions set out above are still satisfied at the end of the period for which he was admitted initially.”

11.
Finally, it was common ground that these Rules set out a more “flexible” approach to the grant of leave to those wishing to establish themselves in business or self-employment than the current Rule in HC 395 (see R v SSHD ex parte Joseph [1977] Imm AR 70 and EK (Ankara Agreement – 1972 Rules – construction) Turkey [2010] UKUT 425 (IAC)).

The Respondent’s Decision

12.
In her decision of 16 September 2014, refusing the applicant leave, the respondent applied both paras 4 and 21 of HC 510 in the following terms:

“You have applied for leave to remain in order to establish yourself in business under the Turkey-European Community Association Agreement (ECAA). This contains a ‘standstill clause’ which means that the United Kingdom may not impose conditions for business applicants less favourable than were in force when the agreement came into force for the UK in 1973. Your application has therefore been assessed in accordance with the after entry business provisions in force in 1973 (HC510).

However, your application is refused under paragraphs 4 and 21 of HC510.

You are referred to paragraph 4 of HC510, which states:

‘In deciding these matters account is to be taken of all the relevant facts; the fact that the applicant satisfies the formal requirements of these rules for stay, or further stay, in the proposed capacity is not conclusive in his favour. It will, for example, be relevant whether the person has observed the time limit and conditions subject to which he was admitted; whether in the light of his character, conduct or associations it is undesirable to permit him to remain; whether he represents a danger to national security; or whether, if allowed to remain for the period for which he wishes to stay, he might not be returnable to another country.’

Further to the highlighted section of paragraph 4 (and paragraph 21 below) your application is refused because you have breached immigration law in the following regard:

The Secretary of State is not satisfied that you have observed the time limit of your leave to remain in the United Kingdom.

It has previously been established that you have not held leave to remain since 30 January 2005 and your appeal contesting that fact was dismissed. You have now been an overstayer in the United Kingdom since that date and all your appeal rights were exhausted on 4 May 2011.

It has therefore been decided, taking all the circumstances of your case into account, that you should not be allowed to benefit from your breach of immigration law.

Your case has also been considered under paragraph 21 of HC510. Permission to establish in business is dependant upon a number of factors although satisfying the Secretary of State that these formal requirements are met is not conclusive in your favour in accordance with paragraph 4 of HC510 above. However, your application is refused under paragraph 21 of HC510 because, despite the fact that you have put together your current application to show your intention to operate a business as an importer and exporter of medical equipment, your documentary evidence has all been accumulated whilst you have remained in the United Kingdom as an overstayer with no legitimate right to remain here and so these documents are not acceptable for the purpose of consideration of your current application.

You made your application on 26 April 2014. However, your leave to remain expired on 30 January 2005. You therefore did not have leave to remain at the time of your application.

Your application for leave to remain in the United Kingdom has been refused and you no longer have any known basis of stay here. There is no right of appeal against this refusal.”

The Applicant’s Challenge

13.
The applicant’s challenge is set out in the grounds, in Mr Walsh’s skeleton argument and his oral submissions. In essence, he challenged the respondent’s decision of 16 September 2014 on two bases:

1.
In refusing the applicant’s application in reliance upon the fact that he was an overstayer the Secretary of State has elevated the applicant’s breach of the time limit condition in his leave to a ‘trump’ card first by refusing to consider evidence accumulated in the UK whilst he was an overstayer under para 21 and, secondly in exercising discretion in accordance with para 4 against the applicant.

2.
As a consequence of failing to consider the merits of the applicant's claim under para 21, the respondent acted unlawfully in refusing leave by failing to consider all the applicant's circumstances including the merits of his claim when exercising discretion under para 4.

14.
Mr Walsh submitted that by relying upon the applicant's status as an overstayer in refusing leave under HC 510 the respondent had, in effect, illegitimately moved arguments previously rejected by the Court of Justice concerning the application of the "standstill clause" to an application of the Rules. In particular, he relied upon the ECJ's decision in R v SSHD ex parte Savas (C-37/198) [2000] INLR 398 which held that the "standstill clause" in Art 41(1) of the Additional Protocol applied even where the individual had remained and carried on business activities as a self-employed person in breach of the domestic immigration law.

15.
Further Mr Walsh relied upon the decision in Oguz v SSHD (Case C-186/10) [2011] Imm AR 843 where the CJEU rejected the UK government's argument that the "standstill clause" could not apply to an individual who had entered into self-employment business in breach of UK immigration law. In particular, at [40] the CJEU rejected the UK government's argument (set out at [39]) that if the position was otherwise:

"such nationals might rely on the clientele and business assets which they may have built up during an unlawful stay in the host Member State, or on funds accrued there, perhaps through employment, and so present themselves to the national authorities as self-employed persons now engaged in, or likely to be engaged in, a viable activity, whose rights ought to be recognised pursuant to the EEC-Turkey Association Agreement."

At [40] the court succinctly stated: "Such an argument cannot succeed".

16.
Mr Walsh submitted that the respondent's decision was directly contrary to the approach in Oguz .

The Respondent's Position

17.
The respondent's case is set out in the detailed grounds of defence and in Ms Bayoumi's skeleton argument and her oral submissions.

18.
She submitted that the Secretary of State was entitled to take into account that the applicant's application was made, and based upon, evidence accumulated whilst in the UK as an overstayer. She submitted that that was not inconsistent with the CJEU's decision in Oguz which merely decided that the application of the "standstill clause" was not excluded in the case of an overstayer. She submitted that it was clear from the case law that the application of paras 4 and 21 required the Secretary of State to consider "all the circumstances" including the individual's immigration status.

19.
Ms Bayoumi referred me to the respondent's relevant policy guidance: Business applications under the EEC-Turkish Association Agreement (4 March 2014) at pages 190-193 of the bundle. That stated that the respondent must consider "all the relevant circumstances of an application" including whether an applicant has worked in breach of conditions of leave but that that must not result in an

automatic refusal of a claim under para 4 of HC 510. Ms Bayoumi submitted that the respondent had taken into account all the circumstances under para 4 and she was entitled not to take into account under para 21 when considering the merits of the application evidence accumulated by the applicant whilst unlawfully in the UK. The respondent had cumulatively considered all the relevant factors under paras 4 and 21 and had lawfully made a decision within the ambit of her discretion which was not irrational or otherwise unlawful.

Discussion

20.
As I have already indicated, it was common ground between the parties that the applicant's application fell to be decided under paras 4 and 21 of HC 510.

21.
It was common ground that para 21 set out relevant factors (but no more than that) to be considered by the respondent in determining the substance of the applicant's claim for leave as a Turkish national wishing to establish his business in the UK. In EK , the Upper Tribunal accepted that these Rules were an "open textured exercise in discretion in the round having regard to the general policy and particular factors identified" (at [23]). The factors in para 21 were not mandatory requirements which an applicant is required to fulfil seriatim (see Joseph at pp.73-4 per Robert Goff J).

22.
Indeed, it is clear from the respondent's own guidance that the exercise of discretion under HC 510, applying paras 4 and 21, involves a consideration of "all the circumstances". Under the heading "assessing cases under paragraph 4" the guidance says this:

"While paragraph 4 suggests you must use discretion to take into account all the factors of an application, applicants will not normally be allowed to benefit from:

- a breach of conditions
- circumstances where it would be undesirable to permit them to remain in the UK because of their character, conduct or associations
- circumstances where they represent a danger to national security.

Case law such as that of Oguz and KA (Turkey) established that applicants who have breached immigration law must still be assessed under the 1973 rules and not the more restrictive current Immigration Rules. Under the 1973 rules breaches of immigration law in business cases are covered by paragraph 4 of HC510.

Just because an applicant has worked in breach of their conditions does not mean you must automatically refuse the case under paragraph 4 of HC510. Instead you must consider an applicant's breach of immigration law on an individual basis. This is because a breach of conditions can vary in different ways and so have a different impact on a case.

You must consider all the relevant circumstances of an application, but applicants must not normally be allowed to benefit from breaches in immigration law. This includes first time or repeat applications

based on previously established businesses, or where there are only superficial changes such as a change in name, or change in the status of a business from sole trader to limited company.

The following factors are relevant when you decide if an application, where a breach of immigration law has occurred, should be refused. An applicant:

•
has overstayed a previous period of leave

•
has entered or having sought to enter the UK illegally

•
has sought or obtained leave by deception such as making false representations or failing to disclose material facts in the application (fraudulent and abusive conduct)

•
has breached their conditions of leave to enter or remain (for example, where the applicant started trading before the initial grant of leave and this put the applicant in a position to meet the requirements of paragraph 21, in circumstances where they should not have been able to do so otherwise) if an applicant has breached their conditions of temporary admission or has absconded from temporary admission

....

Working in breach would be considered material (and so more likely to lead to a refusal under paragraph 4) if:

It affects the ability of the applicant to meet the requirements under paragraph 21, for example, the breach enabled the applicant to meet the requirements of paragraph 21 in circumstances where they would not be able to meet them otherwise and this may amount to an abuse of rights. Again this should not automatically result in refusal but is likely to weigh more heavily against the applicant when considering paragraph 4. An example might be where the money gained from working in breach allowed the applicant to buy a share of an existing business that formed the basis of the ECAA application

Where the working in breach occurred after July 2008, (after the end of the 'pragmatic approach' taken by the Home Office to these types of cases) this will count more heavily against the applicant and so make a refusal under paragraph 4 more likely."

23.
In Oguz the CJEU acknowledged that even in cases of fraud or abuse of rights an individual was entitled to the application of the "standstill clause". That overturned the previous view, certainly as espoused in our domestic law, that such cases took an individual outside the standstill clause altogether (see for example R (Tum and Dari) v SSHD (Case C-1605) [2008] 1 WLR 94 and LF (Turkey) v SSHD [2007] EWCA Civ 1441 and Somnez v SSHD [2009] EWCA Civ 582). That effect of Oguz was acknowledged by the Court of Appeal in KA (Turkey) v SSHD [2012] EWCA Civ 1183.

24.
Nothing in Oguz , however, disentitles a Member State from considering all relevant factors, including an individual's immigration status if that is relevant to the immigration laws and rules which the standstill clause require the authorities of a Member State to apply when dealing with a claim by a

Turkish national for leave to establish a business. In the context of the UK, the focus, therefore, shifts to the 1973 Rules in HC 510.

25.
As para 4 of HC 510 makes plain, in exercising discretion whether to grant leave under those Rules, including in respect of an individual who relies upon para 21, account must be taken of "all the relevant facts" and it will be, for example, relevant:

"whether the person has observed the time limit and conditions subject to which he was admitted".

26.
There was, therefore, nothing impermissible in the respondent taking into account, at least in principle and subject to what I say below, the fact that the applicant was an overstayer in exercising discretion under HC 510.

27.
That position is not inconsistent with the CJEU decisions, in particular what is said in Oguz at [39]-[40] which simply recognises that the standstill clause applies and therefore the focus is on the relevant domestic rules. I do not, therefore, accept Mr Walsh's submission that the respondent's decision is unlawful because, in effect, it is contrary to the CJEU's jurisprudence. There is, however, an underlying point in the applicant's first ground which is, in my judgement, well-founded.

28.
On any reading of the Rules and as set out by the respondent in her own guidance, an individual's immigration status is only a relevant factor. Nothing in the Rules dictates that evidence accumulated whilst an individual is unlawfully in the UK should be ignored. Despite Ms Bayoumi's submissions, it is clear to me that that is precisely what the respondent did in her decision letter when considering the application of para 21. In doing so, the respondent, in my judgement, deprived herself of the ability to consider "all the circumstances" of the applicant including the merit of his application when applying para 4. To that extent, I accept that the applicant's second ground of challenge is made out.

29.
However, in my view the respondent had failed properly to consider the applicant's immigration status in any event. As her decision letter makes plain, she adopted an unnuanced approach, namely that he was an overstayer and had been so since 2005 and his application should therefore be refused.

30.
I was not taken to the detailed application and supporting documents of the applicant's claim, but that is helpfully summarised at para 8 of the applicant's statement of facts and detailed grounds which I did not understand Ms Bayoumi to dispute. There it is said:

"By application dated 28 April 2014, the Applicant made a fresh application for leave to remain on the basis of a business proposal, similar to the one already canvassed and relied on. The business proposal as advanced on this occasion contained a very detailed business plan dated 26 April 2014 [File B page 22 to 78], setting out how the proposed business planned to buy and sell some 17 different types of endoscopic consumables to and from private companies. The Plan contained a detailed outline of the relevant regulatory scheme and the experience the Applicant has gained to operate the said business. Extensive market research was relied on [File B page 30 to 34]. It sets out the initial investment and company structure (File B page 39 and 42). Start-up costs of £14,531 are provided for. Marketing Analysis and Strategy have been undertaken and set out in the Plan [File B

page 48 to 52 and 63 to 64]. Estimates of Sales, Income and gross margins were provided [File B page 66 to 68 and page 76). The application contained strong evidence going towards showing the in depth research and contacts the Applicant has developed. Substantial evidence was submitted such as that about the BTI (Binding Tariff Information)-a tool created to assist businesses to obtain the correct tariff classification for goods imported and exported (File B page 92 to 101). Detailed price lists of the relevant consumables were provided [File B page 104 to 170]. He produced evidence of relevant training while studying for his MSc ('Management and Development of International Finance' File B page 216 to 217), Marketing for Beginners [File B page 218 to 219], Accounting and finance for Managers [File B page 223], Certificate in Medical Imaging and Human Body [File B page 220 to 222], Evidence of finances [File B page 279 to 281], Evidence in respect of business premises and business rates [File B page 288 to 321] Tax arrangements with HMRC [File B page 399 to 426]. The Plan and supporting documents contained in the main fresh evidence, not evidence that was part of the applicant's previous applications."

31.
Mr Walsh submitted that the applicant was not relying upon evidence of a business or self-employment he had undertaken whilst he did not have leave in the UK. The applicant was simply relying upon documents he accumulated whilst in the UK without leave either by research undertaken in the UK or by receiving from Turkey supporting documents of his activities and financial position prior to coming to the UK. I did not understand Ms Bayoumi ultimately to dispute this. Indeed, the Secretary of State accepts in her decision that the applicant's "documentary evidence has all been accumulated" whilst he remained in the UK.

32.
In my judgement, this context was a relevant factor for the respondent to take into account in exercising discretion and taking into account the fact that the applicant was an overstayer.

33.
In KA (Turkey) , the Court of Appeal acknowledged that there were a number of factual situations underpinning an individual's "unlawful status" which were relevant. At [97] Rix LJ said:

"I have expressed the view that LF (Turkey) was premised on a factual situation which was viewed as an abuse of rights, equivalent to fraud, because the applicant there could only bring himself within the standstill clause by virtue of his breach ... I have sought to demonstrate that the 2005 IDI did not deal with breach of condition outside what could properly be viewed as fraudulent activity or abuse of rights; and that the 2009 IDI has adopted a more nuanced attitude to breach of condition in a proper attempt to distinguish cases of fraud/abuse and other cases. Plainly, cases of fraud or abuse, or applications from persons who were not even lawfully in this country, are very different from the situation of incidental breach of condition."

34.
In this case, it is not suggested by the respondent that the applicant has engaged in fraud or abuse. Equally, his situation is, as Ms Bayoumi submitted, unlike that of the individual in KA where that individual had worked in breach of a condition only for a short period of time but on legal advice and ceased to engage in self-employment when advised that he could not do so. Whilst Rix LJ linked an application by a person who was not lawfully in the country with fraud or abuse - to contrast it with "incidental breach of condition" - I do not understand him to have necessarily seen those categories as of equal dis-merit but simply to contrast them with a case of obvious merit, namely a "situation of incidental breach of condition".

35.
In this case, of course, there is also no suggestion that the applicant has actually engaged in self-employment contrary to a condition in his leave or whilst here unlawfully. All he has done is remain unlawfully in the UK and, during that time, accumulated documents and material (some relating to activity before he was even in the UK) to support his application that he has the intention and ability to establish himself in business. A common sense view would suggest that his unlawful presence is not necessarily on an equal footing with a person who is unlawfully present and unlawfully engages in self-employment in the UK and then relies on evidence of that self-employment to found his claim under HC 510.

36.
In her decision, by simply asserting that the applicant had overstayed albeit for some length of time, the respondent failed to take into account this context relevant to the application as one of “all the circumstances” she was required to consider under para 4 and in accordance with her own policy guidance. The approach to her discretion had to accommodate a more nuanced approach than a simple assertion of unlawful presence. In that regard also, the respondent acted unlawfully and her decision to refuse the applicant leave is flawed.

37.
In this case, the applicant has not had the merits of his application determined and, if the merits are established, the respondent has not considered the exercise of discretion having regard to “all the circumstances” including the full context of the applicant’s immigration status including the extent to which that has contributed to his ability to make the application. The applicant is entitled to have his application under paras 4 and 21 properly considered.

38.
To that extent, I accept that the first ground relied upon by the applicant is made out and for those reasons also the respondent’s decision is unlawful.

Decision

39.
The applicant’s claim succeeds. The respondent’s decision of 16 September 2014 is unlawful and is quashed.

Signed

A Grubb

Judge of the Upper Tribunal