



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

Appeal Number: IA/00204/2014

THE IMMIGRATION ACTS

Heard at North Shields

**Determination
Promulgated**

On 9 July 2014

On 3 November 2014

Before

UPPER TRIBUNAL JUDGE DEANS

Between

MR HALIL KALLECI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Bandegani of Counsel, instructed by Kidd Rapinet
For the Respondent: Mr P Mangion, Home Office Presenting Officer

DETERMINATION AND REASONS

- 1) This is an appeal with permission against a decision by Judge of the First-tier Tribunal Cope dismissing an appeal against refusal of indefinite leave to remain in accordance with the Turkey Association Agreement 1963.
- 2) The main provision of the Immigration Rules with which this appeal is concerned is paragraph 28 of HC 510, which is preserved intact for the purpose of the Turkey Association Agreement. This provision provides that a person who is admitted in the first instance for a limited period and who has remained here for 4 years in approved employment, or as a businessman, or a self-employed person, or a person of independent means,

may have the time limit on his stay removed unless there are grounds for maintaining it.

- 3) The appellant is a national of Turkey who came to the United Kingdom in February 2009 and shortly afterwards established himself as a barber trading under the name of Istanbul Barbers in Elswick in Newcastle. He received leave to remain under the Turkey Association Agreement. In 2012 the appellant handed over part or all of his business to his son because of ill-health. In September 2013 the appellant took possession of premises in Houghton Le Spring, where he has established a barber's business, which opened at Christmas 2013. He does not work in the business himself but employs staff. The application for indefinite leave to remain was made on 18 October 2013.
- 4) In refusing the application the respondent noted that the application was made on the basis of the appellant running the Istanbul Barbers business in Elswick. According to the Land Registry, however, the premises at 42 Elswick Road had been transferred to Mehmet Kalleci on 10 July 2012. The appellant submitted a lease for premises at 10 White Lion Site in Houghton Le Spring. The lease was dated 14 October 2013 but was not signed and was not accompanied by an extract from the Land Registry. The respondent took the view that the appellant had not held tenure of business premises for the requisite period under the Turkey Association Agreement. In addition he had not shown that he was genuinely established in business. In particular, he had ceased to operate as a self-employed business person on 10 July 2012 and had not since re-established himself.
- 5) The Judge of the First-tier Tribunal directed himself that the burden of proof was upon the appellant to show that he had continued to be in self-employment. On the basis of the available evidence, the judge was not satisfied on the balance of probabilities that the appellant had shown that he had established himself in business as a barber at Houghton Le Spring and therefore he would not succeed under the Turkey Association Agreement.
- 6) The judge went on to find that the appellant had been living in the UK for only 5 years and would not therefore meet the requirements of paragraph 276ADE in terms of private life. Although the appellant's son was in the UK the appellant was not claiming a right to remain on the basis of family life. There was nothing in the evidence to indicate that the refusal was disproportionate under Article 8 of the Human Rights Convention.
- 7) Permission to appeal was given on several grounds. First of all it was arguable that there had been a procedural irregularity in that a point in the application form on which the judge relied in his determination had not been put to the appellant at the hearing for an explanation. The second point was that arguably the judge did not consider the documentary evidence properly. The judge noted that the evidence had been lodged late. It was arguable that the judge did not assess the documents on their own terms

according to their content and origin but having made an adverse credibility finding then decided that the documents were not reliable.

- 8) Thirdly, it was arguable that the judge had not had regard to relevant evidence in the form of a letter from the appellant's accountants in which they expressed the view that the appellant was genuinely self-employed.

Submissions

- 9) At the hearing before me Mr Bandegani, for the appellant, said that these three issues overlapped and all fell under a general challenge to the fairness of the decision. Mr Bandegani began with the accountant's letter, which confirmed that the appellant is self-employed and trading as Istanbul Barbers in Houghton Le Spring. The letter was dated 19 February 2014 and was from Choudry Associates, Chartered Certified Accountants. It states that they had been acting for the appellant from 7 February 2014 and that he was self-employed and trading in the circumstances set out above. The letter criticises the appellant's former accountants for seemingly not having submitted self-assessment returns for the appellant despite the appropriate documents having been supplied to them in 2009.
- 10) Mr Bandegani submitted that this letter of 19 February 2014 was not considered by the Judge of the First-tier Tribunal and was not referred to in the determination although it was directly concerned with the primary issue in the appeal. The appellant's evidence at the hearing was that he was still involved in the original shop in Elswick as well as running the business in Houghton Le Spring.
- 11) Mr Bandegani continued that at paragraphs 31-33 of the determination the judge commented that the application was based on the business at Elswick and not at Houghton Le Spring. The judge referred to the lease for the property at Houghton Le Spring and to other documents taken into consideration. The judge, however, treated these documents as unreliable. In doing so the judge did not look at all the evidence in the round. At paragraph 50 of the determination the judge pointed out that the appellant had seemingly signed the lease for Houghton Le Spring and seemingly had been in the premises for some weeks beforehand but the judge did not consider that the lease was reliable evidence. The judge expressed concern that although the documents relied upon were dated from December 2013 or earlier, they had only been produced and served the day before the hearing despite a direction dated 22 January 2014 from the Tribunal requiring documents to be submitted within 3 weeks of that date. Mr Bandegani submitted that the late lodging of the documents was irrelevant to the assessment of their reliability. Although the judge referred in his determination to the case of Tanveer Ahmed [2002] Imm AR 318, the judge was not required to consider timeliness in terms of that decision. At the same time the judge disregarded the letter of 19 February 2014 from the accountants. The judge's treatment of the documentary evidence was sufficient to amount to a material error of law.

- 12) The third issue to which Mr Bandegani referred was the lack of any reference in the application form to the business in Houghton Le Spring. As a result the judge said that the appellant's evidence about his business in Houghton Le Spring was unreliable. The appellant was not given an opportunity at the hearing to comment on this point. The judge recorded at paragraphs 51-52 of the determination that the appellant had offered to produce photographic evidence of his business but he was not given an opportunity to answer the judge's concerns. The judge did not consider all the evidence in the round, contrary to his claim that he had.
- 13) Mr Bandegani further stated that an application had been made for an adjournment for further evidence to be lodged but this had been refused. The judge did not properly consider the evidence and the decision should be set aside.
- 14) Mr Mangion referred to a rule 24 response on behalf of the respondent. This stated that the judge took into account all the material documents and oral evidence and it was open to the judge to take into account the application form and contrast the details given there with the documents for the business in Houghton Le Spring. There was an opportunity to offer further evidence on the business in Houghton Le Spring but this was declined, according to paragraphs 51-52 of the determination. The judge considered the evidence in the round and correctly directed himself as to the burden and standard of proof.
- 15) Turning to the accountant's letter of 19 February 2014, Mr Mangion acknowledged that the judge did not refer specifically to this. The judge referred at paragraph 43 of the determination to problems the appellant had had with his former accountants and said the appellant had failed to provide evidence of his new business from other sources, such as a bank, suppliers, regular customers, HMRC, utilities or the local authority. The point about the accountant's letter was not material. The content of the letter was based on no more than the information provided by the appellant.
- 16) Mr Mangion continued by pointing out the judge's references to the case of Tanveer Ahmed. This case did not give a list of which should be taken into account. It was for the judge to assess the factors to be considered in assessing the reliability of the documentary evidence. The judge was entitled to find that the late submission was of some concern and did not overstate this point.
- 17) Turning to the content of the application form, Mr Mangion said the appellant was given notice of this point through the reasons for refusal letter of 3 December 2013. It was pointed out on page 2 of this letter that the appellant had applied for indefinite leave to remain on the basis of the business at Elswick but the premises had been transferred on 10 July 2012. The unsigned lease dated 14 October 2014 for the premises at Houghton Le Spring was produced but it was not accepted as genuine by the respondent.

Mr Mangion pointed out that the appellant was represented before the First-tier Tribunal and this point in the refusal letter should have been identified as the main issue in that letter. The judge was not asking for specified evidence but found two explicit contradictions in the evidence before him, as identified at paragraphs 39 and 46 of the determination.

- 18) Mr Mangion continued that the evidence did not cover the position between July 2012, when the appellant passed the business in Elswick to his son, and October 2013, when he began the new lease. The business in Houghton Le Spring did not begin operating until Christmas 2013. This left a gap of a year for which there was no evidence.
- 19) Mr Mangion acknowledged that the business recognised for the purpose of the Turkey Association Agreement need not be the same business as the appellant had set up on arrival in the UK. He stated, however, that it would not be permissible to close one business and then start up another just before making an application for leave to remain.
- 20) In response Mr Bandegani referred to the case of EK (Ankara Agreement-1972 Rules - construction) [2010] UKUT 425. There was no requirement that a later application be made on the same terms as a previous one. The appellant had supplied evidence with his application about the setting up of a new business and there was evidence relating to each business. The Secretary of State had not accepted that the lease of the property in Houghton Le Spring was a genuine document so the appellant had sought to produce further evidence in relation to this. The Rules were open-textured and did not require evidence in a specified form or within a specified time. Even if there was a gap in the evidence for a particular year the application could still succeed.
- 21) The parties were agreed that if there was an error of law in the determination, as a result of which it was set aside, the appeal should be remitted to the First-tier Tribunal for a further hearing.

Discussion

- 22) Notwithstanding the accomplished manner in which Mr Mangion argued the case for the respondent, I am satisfied that the approach taken by the Judge of the First-tier Tribunal was flawed and amounted to an error of law. I acknowledge that in the reasons for refusal letter the Secretary of State had identified an apparent discrepancy between the application form, which depended on the appellant's involvement in the business in Elswick, and the additional documentation provided, incomplete though it was, which related to a new business in Houghton Le Spring. The respondent was entitled to rely on this discrepancy in refusing the application. The appellant was equally entitled to adduce evidence in the course of his appeal to explain the discrepancy.

- 23) Where the evidence lodged for the purpose of the appeal was in documentary form, the judge should have approached this by looking at the sources of the evidence and considering whether it did or did not support the oral evidence given by the appellant. Instead the impression given by the judge in his determination was that he found the appellant's evidence to be lacking in credibility, largely on the basis of the discrepancy identified by the respondent arising from the application form, and then, on the basis of having found that the appellant's evidence was lacking in credibility, decided that the documentary evidence was unreliable, in part because it was lodged and served late.
- 24) I refer to the judge giving this impression in his determination because it may not have been the way in which the judge assessed the evidence in his own mind. As far as the parties are concerned, however, they have only the determination by which to assess the judge's reasoning and the impression given by the judge as to his reasoning in the determination is all that the parties can found upon. The judge may not have thought he was being unfair but that is the impression he has given by the way in which his reasons are expressed.
- 25) An appeal like this one is quite different from an asylum appeal concerned mainly with events that have taken place in another country and where there may be very little evidence of these events apart from the appellant's own testimony. In such an appeal there may be supporting documents from the appellant's country of origin on which the appellant relies but these cannot be tested and assessed in the same way as a document produced in the United Kingdom by an identified and named third party. This appeal was concerned wholly with the appellant's activities in the UK and although the judge heard oral evidence only from the appellant, there was a significant volume of documentary evidence from named third parties in the UK. This documentary evidence required to be properly assessed and could not be treated as unreliable simply because of the judge's concerns about the credibility of the appellant's oral testimony.
- 26) The consequences of the way in which the judge approached this appeal and expressed his reasons were that the appellant appears not to have been given a fair hearing and the judge's reasoning is not sufficient to support his conclusions. These amount to errors of law on the basis of which the decision is set aside.
- 27) The appropriate course is for the appeal to be remitted to the First-tier Tribunal to be reheard. It was clear from the points made by the judge and by the discussion before me that there are questions still arising from the appellant's evidence which require to be answered. These include, for example, the extent of his involvement in the Elswick business after July 2012; the extent of his involvement in the new business in Houghton Le Spring; and his activities during the period between the transfer of the Elswick premises to his son and the setting up of the new business. It is to be anticipated that for the purpose of the hearing before the First-tier

Tribunal further documentary evidence will be provided by the appellant in accordance with the directions to be made by the First-tier Tribunal and that this documentary evidence will emanate from appropriate sources. The Judge of the First-tier Tribunal drew attention to the absence of evidence from, for example, HMRC and, while at that time the appellant explained this omission on the basis of an alleged failure by his previous accountants, the appellant has now had adequate time in which to remedy the position in this regard.

Conclusions

- 28) The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.
- 29) I set aside the decision.
- 30) The appeal is remitted to the First-tier Tribunal a hearing before a judge other than Judge Cope.

Signed

Date: 3 November 2014

Judge of the Upper Tribunal