



Neutral Citation Number: [2019] EWCA Civ 1870

Case No: C9/2018/1034

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

The Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday, 8 October 2019

Before:
SIR ERNEST RYDER, SENIOR PRESIDENT
LORD JUSTICE HICKINBOTTOM
and
LORD JUSTICE LEGGATT

Between:

SE (TURKEY)

Applicant

- and -

**THE SECRETARY OF STATE FOR THE HOME
DEPARTMENT**

Respondent

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Mr Harshaka Kannangara (instructed under the direct access scheme) appeared on behalf of the **Applicant**

Mr Niazi Fetto (instructed by **the Government Legal Department, LONDON WC2B 4TS**) appeared on behalf of the **Respondent**

Judgment

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Sir Ernest Ryder:

1. This is an appeal by Mr SE against the decision by Upper Tribunal Judge Storey to refuse permission for judicial review of the decision by the Secretary of State of an application for leave to remain as a businessperson under the European Community Association Agreement (the "ECAA"). The issue turns on whether the funds held in the bank account of the appellant's brother can satisfy the requirements for obtaining a business visa under the Additional Protocol to the Turkish ECAA. Central to this question is whether the appellant can be said to have sufficient control over £4,000 gifted to him by his sister and held on his behalf in his brother's British bank account for the requirements of paragraph 21 of HC510. According to guidance issued by the Secretary of State an applicant must provide sufficient evidence to show that (1) the funds are under their own control and (2) there is no possibility that the money may be recalled or withdrawn from the business at short notice. An extension of time and permission to appeal was granted by the single judge case on 14 November.

2. The appellant, who is a Turkish citizen, came to the United Kingdom in July 2016 with leave to remain as a visitor until 25 January 2017. On 23 January 2017 he applied for leave to remain in order to establish himself as an ECAA self-employed migrant. On 7 July 2017 the Secretary of State refused his application. The appellant applied for administrative review to the Secretary of State, and on 23 August 2017 the Secretary of State maintained the 7 July decision. The Secretary of State's decision letter of 23 August was undated. The date of 23 August was only stated on a recorded delivery receipt. The appellant's solicitors informed him of the decision on 12 September 2017. The appellant needed to demonstrate that he satisfied the criteria set out in the Statement of Immigration Rules for Control after Entry (HC510), applied to determine an application by a Turkish national for leave to remain in the UK as a businessperson under the ECAA. At paragraph 21 of HC510 it states:

"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..."

3. The evidence is that the appellant had received a gift of £4,000 from his sister, which he deposited in his brother's United Kingdom bank account. The appellant's brother provided evidence in writing that he would provide the appellant with this sum immediately on request. The Secretary of State maintains that, because the money was held in an account to which the appellant had no direct access and in respect of which the appellant did not have full ownership and control, the requirements of HC510 were not met.

4. On 27 November 2017 the appellant lodged his application for judicial review of the 23 August decision, and on 6 April Judge Storey refused the application on the basis that it was made out of time. In doing so, the judge observed that in any event the application would have been refused on the merits.

5. Judge Storey dealt with the claim in this way. He first considered the lateness of the application. He did not accept the appellant's explanation as to why the application was lodged more than three months after the Secretary of State's decision on 23 August 2017. The appellant's explanation that the letter was undated and only delivered to him on 12 September 2017 was rejected on the facts. The judge found that the Secretary of State sent a decision letter on 23 August 2017 and that it was delivered the next day. He said that it was the responsibility of the appellant's solicitors to notify the appellant. I have to say that may be a decision which is incapable of being dislodged on the facts, but out of fairness to the appellant I shall go on to look at the merits of the decision made by Judge Storey. Judge Storey further held that, even if time had been granted for the application, permission would not have been granted.
6. The appellant contends that the Secretary of State wrongly required the appellant to have a United Kingdom bank account. However, the judge found it to be clear that the decision of the Secretary of State of July 2017 was not based on the lack of a UK bank account but on the appellant's failure to demonstrate that he had money of his own to establish a business and so meet the requirements of paragraph 21 of HC510: that is, it was open to the Secretary of State to find that the gift from the sister, held within the brother's bank account, together with a letter from his brother, assuring him that he would provide the funds immediately upon request, established only that the brother had the funds under his control. Indeed, the bank statements that accompanied the documentary material make it quite clear that the brother on two occasions used part of the £4,000 for his own purposes. The judge held that it was not procedurally unfair for the Secretary of State not to interview the appellant, because the onus was on the appellant to produce evidence that he met the requirements of the rules and, in light of the materials provided, the judge held that an interview would have made no material difference.
7. Before this court the appellant re-makes the following submissions. The appellant could not open a UK bank account because he was here on a visitor visa. The funds in the sum of £4,000 were held in his brother's account and were a gift from his sister. The intention was to transfer the funds into an account held by the appellant as soon as he was able to open his own account in this jurisdiction. There is of course no requirement for the appellant to have a bank account under his own name. The funds held in the brother's account should be sufficient, the appellant says, to satisfy paragraph 21 of HC510: that is to say, that the appellant will be devoting assets of his own to the business. I note in passing that no evidence was filed about why the appellant had not opened his own bank account elsewhere, for example in the Turkish jurisdiction or otherwise entered into a binding arrangement with his brother. Furthermore, as I have adverted to, the bank account evidence provided to the Secretary of State and the tribunal shows that the funds did fall below the gift to the appellant on two occasions, albeit that the brother on both occasions made good the original sum.
8. The Secretary of State submits that there is no error of law in the judge's approach. She says that assets, in accordance with paragraph 21 of HC510, may derive from a number of sources such as gifts. However, the funds must be under control of the applicant and there must be no possibility that the money can be recalled or withdrawn from the

business at short notice. Putting to one side an exaggerated use of language on occasions by the Secretary of State's decision-maker, this central point is made good from the guidance.

9. Turning then to the legal framework. Article 41(1) of the ECAA outlines the "standstill clause" as between the UK and Turkey:

"The Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services."

The relevant rule is contained in paragraph 21 of HC510:

"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."

10. The relevant extract of ECAA business guidance, published in this edition by the Home Office on 15 October 2015, provides that:

"Evidence the funds or assets belong to the applicant

Applicants should be able to provide sufficient evidence to show that:

- the source of the funds is legitimate
- the funds are under their own control
- there is no possibility that the money may be recalled or withdrawn from the business at short notice

They should provide evidence of the available funding."

The central issue is whether the appellant has "assets of his own" to invest in the business.

11. Paragraph 21 of HC510 requires that an applicant (1) will be devoting assets to the business and that (2) those assets are his own. In the present case the former is arguably satisfied as the appellant has confirmed that he intends to invest the £4,000 gift that has been placed in his brother's bank account into the business. It is less clear that the latter is satisfied. The guidance frames ownership through the prism of control, and no issue is taken with the content or status of that guidance before this court. The guidance requires applicants to demonstrate that (1) the funds are under their control and (2) there is no possibility that the money may be recalled or withdrawn from the business at short notice. Therefore, in order to prove sufficient ownership of the assets, appellants must show that they have a sufficient degree of control over the assets such that they are capable of preventing their recall or withdrawal from the business at short notice. It is the latter requirement of the guidance, the ability to prevent any possibility that the money may be recalled or withdrawn from the business at short notice which provides the difficulty for this appellant. The appellant's sister has confirmed in writing that she provided the sum of £4,000 to the appellant as a gift. It is therefore salient that the money does belong to the appellant. However, the appellant's brother has sole access to the account in which the money is held. As such, money can be and was taken out of the account by the brother at short notice and used for a purpose other than investing in the business.
12. Crucially, as regards paragraph 21 of HC510 and the accompanying guidance, the appellant does not have the immediate control to stop such use of the funds by the brother at short notice. Judge Storey was therefore correct to point out that the Secretary of State's refusal of leave to remain was not based on the fact that the bank account is not registered in the appellant's name. It was based on the fact that the appellant does not have sufficient control over the money because he has no direct access to the account in which it is held and consequently cannot insure against the possibility that the money will not be recalled or withdrawn from the account at short notice.
13. In summary, the appellant has failed to demonstrate that he has sufficient control over the funds to meet the requirements of paragraph 21 of HC510 and accordingly, so far as the appeal on the merits is concerned, regardless of the time issue, I would dismiss this appeal.

Lord Justice Hickinbottom:

14. I agree.

Lord Justice Leggatt:

15. I also agree.
16. Order: Appeal dismissed.

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