Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/07580/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination promulgated**
on 5 November 2013	**on 11 November 2013**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

SERKAH TARAKCI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr D Byrne, Advocate, instructed by Drummond Miller, Solicitors
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1) The appellant is a citizen of Turkey born on 21 April 1983. He appeals to the Upper Tribunal against a determination by First-tier Tribunal Judge Watters, promulgated on 7 June 2013.

2) The grounds are as follows:

1 The FtT heard an appeal against a decision to refuse to grant the applicant leave as a self employed business person pursuant to paragraph 4 and 21 of HC510, the 1973 After Entry Business Provisions, still in force as a result of the "standstill provisions" (s. 2(1) European Communities Act 1972, Art 41 of Additional Protocol of 1970).

2 To succeed an applicant should meet paragraph 4 and 21, they read:

> "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 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 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 occur; 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."

3 The determination gives two reasons for rejecting the applicant's claim. Firstly it should be noted that the applicant met the requirements of paragraph 21 (see §8 of the determination), those are the requirements to demonstrate a qualifying business. Those two reasons are that the applicant was an overstayer and secondly that he commenced his business prior to applying for leave to remain. Those two considerations are relevant to paragraph 4 of HC510.

4 The FtT rejected the applicant on the footing that the applicant began his business prior to applying for leave to remain and there is a public interest in persons not doing so. The FtT concluded that reason sufficient, along with him having no leave, to reject his application in considering matters under paragraph 4.

Error 1

5 The FtT erred in law in failing to take into account that the applicant:

a. Entered the UK lawfully for a lawful purpose (studies)
b. Has not committed fraud or been dishonest
c. The public interest in promoting free movement and the gradual integration of Turkey into the European Union

6 In relation to (a) that is plainly a material factor and one of significance to the Advocate General Kokott in Oguz (cited at §62 of KA (Turkey) v Secretary of State [2012] EWCA Civ 1183).

"52. The assessment should therefore be no different in a case like the main proceedings where, unlike the cases already decided, the person relying on the standstill clause even had leave to remain and had merely breached a condition of that leave**. Lastly, the applicant in the main proceedings did not enter the United Kingdom unlawfully**, but had entry clearance and even a work permit, albeit not for activity of a self-employed person. Only by taking up activity of a self-employed person, which he soon ceased again, did he breach a condition of his leave to remain." (emphasis added).

7 Those factors were regarded by the English Court of Appeal in KA as relevant factors, see 62, per Rix LJ,

"Although Advocate General Kokott was speaking of the applicability of the standstill clause, not of the operation of the discretion exercised by the national authorities under the appropriate national rules, it is clear that the factual distinctions which she there adverts to, and which have a clear resonance for the present case, were considered by her to be **relevant distinctions for the exercise of that discretion"** (emphasis added).

8 The FtT erred in law in failing to take that relevant positive and distinguishing factor into account.

Error 2

9 The FtT erred in law in failing to ask, notwithstanding that the applicant had commenced his business prior to applying, whether he had sought to take "any advantage of commencing trading in order to leverage his position" [see Rix , LJ at 93]. That was regarded in KA as a relevant factor in the paragraph 4 assessment vis-à-vis persons applying after they had commenced their business.

Error 3

10 The FtT assess whether the public policy issues in this case justify a refusal of the application. In particular the FtT at 12 hold that the public policy of discouraging or penalising work without leave is sufficiently weighty to render the application a failure in terms of paragraph 4. The FtT erred in law failing to identify that the public policy in relation to an over-stayer requires a consideration of "the extent of any overstaying and how culpable the applicant was in becoming an overstayer". In treating overstaying of itself as a basis to refuse the FtT erred in law, the respondent identifies the extent and nature of overstaying as necessary additional categories of assessment in judging whether public policy demands a refusal. The FtT erred in law in failing to take that into account or in asking only part of the question.

3) Upper Tribunal Judge McKee granted permission on the view that the grounds made an arguable case that the appellant did not fall within the "fraud exception" and that public policy did not require him to be refused leave to remain.

4) Mr Mullen acknowledged that the determination is apparently self-contradictory between paragraph 11, where the judge says that overstaying and starting a business without permission does not justify refusal, and paragraph 12, where he finds that it does. However, he said that the error was not to the appellant's ultimate disadvantage. Paragraph 11 missed the point which could be derived from paragraph 51 of KA:

> We now know … that even in a true case of fraud or abuse of rights, the standstill clause still applies. We also know … that a breach of conditions in jumping the gun in the commencement of an applicant's proposed business need be neither fraudulent, nor an abuse of rights, nor tantamount to other. An abuse of rights only arises where … the right is claimed by virtue of its abuse.

5) Mr Mullen submitted that the appellant had overstayed and ignored the rules at the time he started his business. In terms of paragraph 4 of HC510 that was relevant, and should in the circumstances be decisive. The business started almost 2 years after the appellant's leave had expired. He said that refusal of his student application was technical or even wrong in law but he had the opportunity to challenge it and did not do so. The judge did not fully take into account that the application was based on an abuse. The correct course for the Upper Tribunal would be to set aside the First-tier Tribunal determination, but to reach a fresh decision again dismissing the appeal. Mr Mullen accepted that the only adverse factor was that the business had not been started within the appellant's leave but as an overstayer. However, he had done so well into that period and so was invoking the right in an abusive manner.

6) Mr Byrne said that the First-tier Tribunal Judge's observation at paragraph 11 that starting the business without permission was not sufficient on its own to justify refusal was correct. The spectrum ran from that of the "casual transgressor" to the "systematic cheat". The appellant's immigration history was relevant. He had the offer of a place on a suitable course (page 324 of his principal inventory of productions in the First-tier Tribunal). His application was refused for technical reasons (page 328). He produced a photocopy not an original of his Turkish qualification (which had presumably been previously established to the satisfaction of the respondent) and he provided evidence of funds dated more than a month prior to his application. Not only were these reasons merely technical, they were contained at the time in guidance not in the Rules, so the appellant might have had a remedy upon appeal. This took him out of the class of those who entered unlawfully or used fraud and dishonesty. It was not a significantly adverse history. The business established is genuine, not a contrivance. The decision to be substituted should be in the appellant's favour.

7) It was common ground that a fresh decision is required; that it should be informed as to the nature and extent of the "fraud exception" by KA; and that the fresh decision is a discretionary one in terms of the Rules, and now for the Upper Tribunal.

8) I do not find the *dicta* on the extent to which overstaying affects this type of case entirely clear. It appears that the matter is discretionary, and ultimately depends on the individual facts. In this case the abuse amounts to overstaying and setting up business in advance of the application. The immigration history is adverse to a degree, but very far from the worst. The appellant is not an entirely innocent transgressor, but

not a systematic cheat. There is nothing which smacks of fraud. On balancing all the considerations to which I have been referred, I think that discretion should be exercised in the appellant's favour.

9) The determination of the First-tier Tribunal is **set aside**. The following decision is substituted: the appeal, as originally brought to the First-tier Tribunal, is **allowed**.

10) Presumably the result is likely to be a grant of leave to remain for the usual initial period under the standstill clause, whatever that may currently be; but not having been addressed on the point, I make no formal direction.

11) No anonymity order has been requested or made.

7 November 2013
Judge of the Upper Tribunal