Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/13980/2013
IA/14038/2013

THE IMMIGRATION ACTS

Heard at Columbus House, Newport	**Determination Promulgated**
On 20 January 2014	**On 11 February 2014**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

Z B (FIRST APPELLANT)
C B (SECOND APPELLANT)
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms C Grubb instructed by Hoole & Co Solicitors
For the Respondent: Mr I Richards, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal is subject to an anonymity order made by the First-tier Tribunal pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230). Neither party invited me to rescind the order and I continue it pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

Introduction

2. The appellants are citizens of Turkey. The first appellant was born on 2 February 1980 and the second appellant was born on 14 February 2010. The second appellant is the son of the first appellant and 'AB' who has leave to remain in the UK as a businessperson under the Ankara Agreement until 29 June 2015.

3. On 13 December 2010, the first appellant was granted limited leave to enter the UK until 13 December 2012. On 19 September 2012, she applied for leave to remain in order to establish herself in business under the Turkey – European Community Association Agreement ("the Ankara Agreement"). On 8 April 2013, the Secretary of State refused the first appellant's application and that of the second appellant as her dependant.

4. The appellants appealed to the First-tier Tribunal. In a determination promulgated on 13 September 2013, Judge A E Walker dismissed the appellants' appeals. Judge Walker was not satisfied that it was the intention of the first appellant to establish a business in the UK under the Ankara Agreement. Consequently, Judge Walker dismissed each of the appellants' appeals against a refusal to vary their respective leave. The judge noted that the appellants did not rely upon Art 8.

5. In respect of the contemporaneous decision to remove the appellant under s.47 of the Immigration, Asylum and Nationality Act 2006, applying Ahmadi [2012] UKUT 00147 (IAC), Judge Walker concluded that those decisions were not in accordance with the law.

6. The appellants sought permission to appeal to the Upper Tribunal. On 4 November 2013, the First-tier Tribunal (Judge Wellesley-Cole) granted each of the appellants permission to appeal: first, on the basis that the judge had arguably erred in law in evaluating the first appellant's intentions to set up a business; and secondly, in failing properly to consider Art 8 of the ECHR. Thus, the appeals came before me.

7. It is common ground that the appeal of the second appellant is entirely dependent upon that of the first appellant.

The Claim under the Ankara Agreement

8. The basis of the first appellant's claim for leave under the Ankara Agreement was that she intended to set up a business as a cleaner, trading under the name of ZTB Cleaning. In support of that, the first appellant filed a business plan which stated that she expected to draw £700 per month in salary She plans to use £2,000 of her own funds to start up the business and anticipates a monthly turnover of £1,700. The first appellant anticipates a gross profit of £2,242 with a dividend payable from net profit of £6,000 with surplus profits of £224 carried forward.

9. In support of her claim, the first appellant relied upon five "Cleaning Services Contracts" which are at pages 41-45 of the appellant's bundle. These are in identical terms but with different establishments. Two of the contracts, namely the "[A] Bar"

and the "[BS] Bar" are with establishments of which her brother ('HT') is a director. The remaining three contracts are with establishments that the evidence shows were known to the first appellant's brother, HT.

10. In support of her appeal, the first appellant provided a detailed witness statement dated 22 August 2013 at pages 2-7 of the appeal bundle; a witness statement from her husband ('AB') also dated 22 August 2013 at pages 8-9 of the bundle, and finally a witness statement from her brother, HT dated 28 August 2013 at pages 11-12 of the bundle. In addition, at the hearing before Judge Walker the first appellant, HT and AB gave oral evidence. That evidence is set out in detail at paras 24-27 of the determination.

11. The evidence of the first appellant dealt with a number of matters arising from her business plan and the proposed contracts. In particular, the first appellant gave evidence that she intended to work an eight hour day because that allowed her young child to be looked after by her husband. She proposed to work between 6am and 9am for three hours and then again from 3pm until 8pm. Her evidence was that the business was flexible. She gave evidence that she intended to work for no more than 30 hours a week. She intended to work at two places, perhaps those run by her brother but it might also be two of the other establishments. She said that the contracts did not spell out the amount she would be paid but there was a verbal agreement that she would be paid £250 a week under each contract. That would be the equivalent of £500 a week with a per annum income of £26,000. On the basis of fifteen hours' work under each contract, it was pointed out that this was equivalent of a rate of pay of £16.66 per hour. She was asked how this compared with other businesses and she said that all she knew was that her brother paid £250 and other places paid £260 and £270 per week. Her evidence was that she would clean as long as it took and she would be paid £250 per week for the work.

12. The first appellant's brother in his evidence confirmed that he was a local businessman and two of the contracts were with his companies and three were by people he knew personally. The contracts had been agreed with the first appellant; no hours were specified because it was flexible as the establishment opened only limited hours. He explained that the way payment was made for cleaners was for the job, however long it took them to clean. He said that in relation to his two establishments – the [A] Bar and the [BS] Bar – he currently paid the cleaners £250 per week. He said that he had no idea how long it took the cleaners to clean his establishment but he paid them £250 however long it took.

13. The first appellant's husband also gave evidence and he said that they had found out that a normal cleaner could earn a minimum payment of about £6.19 or £6.20 per hour. He said that his wife would work between seven and eight hours a day and at a time so that he could look after their child and that he worked between 9am and 5pm seven days a week in his business.

14. In addition, all three witnesses gave evidence concerning a payment of £10,000 made by the first appellant's father to her. This had been paid into her husband's account

as she did not have a bank account. The first appellant had loaned to her brother £8,000 initially. The first appellant's brother said that he had "bought some stuff because in addition to his other work he is a wholesaler as well." He had repaid that and had subsequently borrowed £2,000 which had also been repaid.

The Judge's Decision

15. In paras 29 to 34 of her determination, Judge Walker gave her reason for reaching her adverse finding in para 35 which was in the following terms:

> "Taking into account my findings above I conclude that the first appellant's business plan is not realistic and is unlikely to succeed and that its shortcomings reflect the reality that she is not intent on establishing her business in the UK under the Ankara Agreement."

16. Judge Walker's reasons (at paras 29-34) were as follows:

> "29. I did not find the evidence given by the witnesses to be satisfactory. At no point was there any clear explanation given as to why the first appellant's brother needed to borrow money for a short term loan especially when this is set against his assertion that he employs over 100 people and is very successful. It is clear from the first appellant's husband's bank account that the first appellant's brother had to borrow a further £2,000 from the first appellant's husband. The first appellant's husband said that money tends to come and go between the first appellant and her brother and therefore if that pattern were to repeat itself in the future the money available to the first appellant for the operation of her business would be severely curtailed. However, I accept that on her evidence the extent of her overheads would be minimal because she plans, she says, to conduct cleaning jobs near to her home where her customers supply all the necessary equipment and consumables. Of the £12,260 expenses set against profit in the business plan, £8,400 is said to be her wages.
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> 30. I do not accept the assertion by the first appellant that the cleaning services contracts supplied with the application are examples. This is because in each case the contracts have been signed by different people on behalf of the client in each case.
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> 31. In her evidence it was apparent that the first appellant has no clear idea of the hours of opening of the various establishments that she intends to work for and further that she has no idea of how she could fit in servicing all the establishments especially if it were to turn out that they had competing demands in terms of the hours that they would want her to clean. She has no idea if she would be able to clean in the cocktail bar at 8pm at night for example. Further the first appellant's inability to ascribe rates of pay to her contracts is also not impressive. I do not accept that she had a verbal agreement as to how much she would earn from the contracts because that is an essential element of any contract. No sensible businessman would sign a contract in which the cost to him of the contract is left out. Equally the first appellant would not agree to undertake work for a fixed price where she has no clear understanding of how much work there would be or how long it would take her to clean the premises. The first appellant did not say that she understood precisely what she would be expected to do at each of the premises. The fact that the rate of pay of £250 per week for the agencies, or £16.66 per hour based on 15 hours' work a week, is over 2.5 times the national minimum wage is such a huge mark-up means that I would have expected the first appellant to have investigated this thoroughly but in fact the first appellant relies, she says,

on what her brother has told her he pays. She was not able to say how long his cleaners work in his premises in order to achieve that level of pay. In addition I note that the contract requires, for example, vacuuming the floors but it does not state how often this should be done. I consider that the first appellant's brother knew full well the importance of being able to demonstrate how much he pays for cleaning in his business and yet he had chosen not to produce this evidence at the hearing.

32. Further I find it very curious that the clients in each contract have agreed to pay the first appellant in advance of her work. Overall I am not satisfied by these documents that they represent any agreement between the first appellant and the supposed clients or that they have been arrived at as a result of any proper or careful negotiation or exploration between the first appellant and the clients and I therefore ascribe no weight to them in evidential terms. Further the business plan is based on the existence of the contracts and accordingly I also discount that in terms of showing that the first appellant is likely to establish a viable business. Further, it seems clear the contracts rely on personal contacts. Whilst there is nothing wrong with that I would still have expected the first appellant to have entered into discussions with the supposed clients which dealt with the essential elements such as her charging rates and how many hours she would be expected to work for each client. The fact that these elements were left out of the contracts leads me to the conclusion that the first appellant has no intention of establishing a business in the UK.

33. The first appellant's brother's assertion that the first appellant would be able to clean his premises for 3 hours a day makes no sense because this would equate to 21 hours a week on the basis of a 7 day week (the level of cleaning he said he has at the moment) and the first appellant said that she does not want to work more than 30 hours a week and yet none of the other contracts allow for her doing anything than a full cleaning job. Therefore it follows that she would have to do one contract in 9 hours a week which is not consistent with her evidence of the amount of hours she would expect to spend at her second contract. Further the evidence of the first appellant's husband that she would earn £6.19 or £6.20 an hour is inconsistent with the first appellant's evidence and is inconsistent with the business plan.

34. I find the first appellant's assertion that she wants to do something on her own contradicts the fact that she does not have a bank account even a bank account jointly with her husband so that even when her father sends her money it has to be paid to her husband."

The Submissions

17. In her skeleton argument and oral submissions, Ms Grubb submitted that the judge had made her finding based on the following (see para 12):

"a) The proposed clients were personal contacts [para 32].

b) The written agreements were not comprehensive [paragraph 31].

i. The Appellant had not provided details of hourly rates of pay [paras 31 onwards].

ii. She had not given clear evidence on the times she proposed to carry out her work [para 33].

c) She does not have her own bank account [para 34]."

18. Ms Grubb submitted that Judge Walker had imposed too high a test in scrutinising the first appellant's business plan, her contracts and evidence about her proposed business. She relied upon [19] of the Upper Tribunal's decision in Akinci (Para 21 HC 510 – correct approach) [2012] UKUT 00266 (IAC) where it was stated:

> "Whilst the suggested evidence to be provided in support of an application is useful as a means to satisfy the Secretary of State of the application, the expectation that the applicant 'is able convincingly to demonstrate an understanding of any written evidence' sets the standard too high and does not represent the approach applied in 1972 which his the acid test. An applicant may have a clear idea of what he plans to do but may not have sufficient sophistication to explain the way in which his ideas have been expressed by a business advisor. He does not have to be a financial expert and in a case of doubt, clarification can be provided if needed and the advisor can be called to give evidence if matters are in doubt."

19. Ms Grubb submitted that the relevant Immigration Rule was para 21 of HC 510 which, by virtue of the 'standstill clause' in the Ankara Agreement, applies in cases of this sort. Under that Rule, the only relevant issue before the judge was whether the first appellant genuinely intended to pursue the establishment of a business in the UK. Ms Grubb referred me to the Tribunal's decision in EK (Ankara Agreement – 1972 Rules – construction) Turkey [2010] UKUT 425 (IAC) at [23]-[24] where the Upper Tribunal sets out the "open textured exercise" required under the 1972 Rules as follows:

> "23. In 1973 the Rules themselves were an open textured exercise in discretion in the round having regard to the general policy and particular factors indentified; so was the practice in applying them ...
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> 24. ... It was certainly the case in 1972 and for a number of years thereafter that the Home Office recognised that a business often needed some time to turn a profit and losses in the early years were not inconsistent with the business that met the policy and purpose of the Rules in general. The case was always considered in the round. In cases of doubt a further extension of limited leave was often given".

20. Ms Grubb submitted that the judge's reasoning had scrutinised at too high a degree the first appellant's business plans and contracts and had, as a result, lost sight of whether she had a genuine intention to establish the business even if some of the detail was omitted and even if her plan was not realistic.

21. In that latter regard Ms Grubb referred me to the head note in Akinci where at [v] the Upper Tribunal stated:

> "A plan is what it says it is: a projection of how it is anticipated things will work out with a possibility of making adjustments as the business gets underway. It is not a strait jacket."

22. Ms Grubb submitted that it was wrong in principle for the judge to subject the business plan to a detailed scrutiny, conclude it was unrealistic and on that basis find against the first appellant having a genuine intention of establishing the business.

23. As regards the detailed points raised by the judge, Ms Grubb submitted that it was not crucial that the contract did not provide for a price. A contract could be both oral and written and the evidence was clear that the agreement was that the first appellant would be paid £250 per week for cleaning each establishment.

24. Secondly, the judge was wrong in principle to require every detail to be included in these contracts which were purely evidence of potential customers and gave a rough detail of the framework within which the first appellant was to supply her services.

25. Thirdly, Ms Grubb submitted that the judge was wrong to form an adverse assessment on the basis of inconsistencies (as the judge saw them) in the hourly rate to be paid. The evidence of all the witnesses was clear: the first appellant was to be paid not on an hourly rate but on a fixed fee consistently with other contracts for cleaning services.

26. Fourthly, Ms Grubb submitted that it was wrong for the judge to draw an adverse inference from the fact that the appellant did not have her own bank account as she was a visitor and there was nothing wrong in principle in her using her husband's account.

27. Fifthly, Ms Grubb submitted that there was nothing wrong in principle in the first appellant making contacts on the basis of "personal contacts". Finally, Ms Grubb submitted that the judge had failed to take into account that the first appellant already had leave as a dependant of her husband and that there was no reason for her to fabricate this claim in order to obtain leave to remain in the UK.

28. Mr Richards submitted that the judge had taken into account all the evidence and the weight to be given to each piece of that evidence was a matter for her unless, which he submitted was not the case, she gave perverse or irrational weight to it. He submitted that the judge was entitled to conclude that the appellant's evidence was, in effect, vague, contradictory and unrealistic in relation to the proposed business and then to conclude that those shortcomings reflect the reality that it was not the first appellant's intent to establish a business in the UK. He submitted that whilst some might disagree with that conclusion, it was one open to the judge and not one arrived at on the basis of an error of law.

Discussion

29. It is common ground that the relevant Immigration Rule is para 21 of HC 510. That provides as follows:

> "**Businessmen and self-employed persons**
>
> 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. 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 stay if the conditions set out above are still satisfied at the end of the period for which he was admitted initially."

30. In Akinci, where a person proposes to set themselves up in business, the Upper Tribunal stated that the Rule is:

> "expressed in broad terms in the context of an approach that any application is to be considered on its merits." (see [14]).

31. At [14], the Upper Tribunal summarised the factors which have to be considered as follows:

> "Permission is stated to depend on a number of factors which include:
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> i. evidence that the applicant will be devoting assets of his own to the business, proportional to his interest in it;
>
> ii. that he will be able to bear his share of any liabilities the business may incur;
>
> iii. that his share of its profits will be sufficient to support him and any dependants;
>
> iv. the applicant's part in the business must not amount to disguised employment;
>
> v. and it must be clear that he will not have to supplement his business activities by employment for which a work permit is required."

32. At [21(ii)] the Upper Tribunal noted that under para 21 of HC 510:

> "A business plan must be realistic having regard to the nature of the enterprise. It is legitimate to ask further questions where the projected turnover is substantially greater than that reflected in the accounts of a business being acquired."

33. Ms Grubb submitted that that statement was made in the context of an individual who was seeking to acquire or join an existing business where the business plan could be assessed against the accounts of an existing business. However, that point was of less potency where the individual was setting up, for the first time, a new business. I accept that the viability of a business plan is a factor even in a case, such as this, where a business is being established for the first time. However, it is clear from both EK and Akinci and the passages to which I have referred above, that a flexible approach is required in assessing the evidence.

34. In this case, I accept Ms Grubb's submission that the judge has, in effect, imposed too high an assessment criterion as a yardstick to assess the evidence concerning the

appellant's business plans and contracts. That, in my judgment, is particularly so in the circumstances of this appeal where the contracts are with the first appellant's brother where, perhaps, a more informal arrangement could be expected. The high standard is clear from the judge's words used in para 32 of her determination that she did not accept that these documents:

> "Represent any agreement between the first appellant and the supposed clients or that they have been arrived at as a result of any proper or careful negotiation or exploration between the first appellant and the clients." (My emphasis).

35. First, the judge was wrong, in my view, to doubt the genuineness of the contractual arrangement simply on the basis that the fee to be paid to the first appellant was not contained within the written contract. The evidence before the judge was clear from all the witnesses that a verbal agreement had been made, consistent with existing practice and the market, that the appellant would be paid a fixed fee of £250. Its absence from the standard written contract was not, in my view, properly to be seen as suspicious.

36. Secondly, the first appellant was candid that some of the detail remained to be worked out if she obtained permission to work. The first appellant's evidence was that she had first-hand experience of the cleaners at one of her brother's establishments where she lived. The fact that she had not yet determined the details of when or for how long she would work was entirely explicable.

37. Thirdly, the judge's reliance upon the fact that the first appellant did not know what hourly rate she would be paid, that the rate was (calculated at £250 per week for fifteen hours' work) over 2.5 times the national minimum wage and that her husband's evidence was that she would earn less than this, namely £6.19 or £6.20 per hour, was insufficient to doubt the genuineness of her endeavour. The evidence of the first appellant and other witnesses was that this kind of work was paid on a fixed fee basis of £250 per week. That was the going rate for cleaning establishments such as that owned by the first appellant's brother. Whatever the hourly rate that worked out as, was neither here nor there, even if it was 2.5 times the national minimum wage. There was no evidence before the judge, other than the evidence of the going rate based upon a fixed fee for cleaning an establishment per week, on which the judge could call into question the amount paid to the first appellant. Whilst the oral evidence of the appellant's husband was that the "minimum payment" a normal cleaner would earn was between £6.19 and £6.20 per hour and he thought that is what the first appellant would earn, that evidence had, again, to be seen in the light of the evidence of all the witnesses as to the fixed fee that the first appellant had agreed, and which was the going rate, for cleaning the relevant establishments. At worst, it merely suggests that the first appellant may have underestimated the amount of time required to clean each establishment which would, in turn, have affected the hourly rate based upon that fixed fee.

38. Finally, it was, perhaps, relevant that the appellant did not have her own bank account, given her evidence that she wished to do something on her own. However, in doubting the genuineness of the first appellant's intentions, if this was to be an

adverse factor, the judge was required to grapple with the appellant's circumstances in the UK, namely that she was still a visitor and (at least for the present) had no reason necessarily to have a separate bank account. In any event, this fact cannot rationally in itself shed much light on the first appellant's intention.

39. For these reasons, therefore, the judge erred in law in assessing the evidence of the first appellant's business plan and factors relevant to her establishing a cleaning business in the UK. Her finding that she was not satisfied that the first appellant intended to establish a business in the UK was, for these reasons, flawed and cannot stand.

Re-making the Decision

40. At the conclusion of the submissions in relation to error of law, I invited the representatives to make any submissions on how, if it became relevant, I should remake the decision.

41. Ms Grubb relied upon the skeleton argument that had been before the First-tier Tribunal and, in addition, she relied upon four "self-billing invoices" which indicated that a named individual had been paid amounts varying between £257.50 and £280 by "[BB] Limited". Ms Grubb indicated that these were invoices showing payments to cleaners in respect of one of the establishments that the first appellant proposes as a potential client. She indicated that the amounts varied to take into account that, on occasions, cleaners consume drinks whilst working and the costs of these were deducted from the payments.

42. Mr Richards accepted that there was evidence that the first appellant was someone who intended to set up a business. He submitted that if the contrary reasons, relied upon by Judge Walker, fell away, then what was left was the evidence relating to the first appellant's intention to establish the business. He did not make any submissions inviting me to dismiss the appeal under para 21 of HC 510.

43. The burden of proof is upon the first appellant to establish on a balance of probabilities that she meets the requirements of para 21 of HC 510. The only issue under para 21 which has been disputed by the respondent is whether the first appellant has established a genuine intention to set up a business.

44. Mr Richards did not seek, in his submissions, to challenge the evidence that was before the First-tier Tribunal in the form of the witness statement and oral evidence of the first appellant, her brother and her husband. I see no reason to doubt it.

45. Approaching the evidence, I bear in mind the importance of looking at the evidence of the first appellant's business plans and contracts in a flexible way. I accept that the written contract may not, necessarily, cover every detail of the planned delivery of services by the first appellant. I bear in mind that it is her intention, in all probability, to provide the services at establishments run by her brother or by his friends. An element of informality might well be expected in such circumstances. I see no reason to doubt the common evidence of the witnesses that the agreement

(made orally) is that the first appellant will be paid £250 per week as a fixed fee for cleaning the relevant establishments. The first appellant has witnessed first-hand cleaners working within her brother's establishments. It may well be that the precise times at which she will provide the services and how long it will take to clean each establishment remains a detail to be worked out when she begins her work. That too may be expected. The first appellant has produced a business plan and a number of contracts to support her proposed business. She has also incorporated a limited company on 8 August 2012, "ZTB Cleaning Services Limited". I also bear in mind that the first appellant already has leave to remain in the UK and, perhaps more importantly, would continue to have leave (as would the second appellant) as the dependant of her husband who himself has leave under the Ankara Agreement. There was no suggestion before me that the first appellant's husband's leave would not continue on the basis of his continued business activity.

46. Taking all the evidence into account, I am satisfied on a balance of probabilities that the first appellant has a genuine intent to establish a business in the UK, namely one providing cleaning services. Given that no other matters under para 21 of HC 510 are disputed by the respondent, I am satisfied that the first appellant meets the requirements of para 21 of HC 510 and is entitled to leave to remain on that basis.

Article 8

47. In the light of that finding, it is not strictly necessary for me to consider Art 8 of the ECHR. Despite Ms Grubb's submissions, it is clear that Art 8 was not relied upon before Judge Walker. It is not referred to in the grounds of appeal to the First-tier Tribunal, nor in her skeleton argument upon which she relied before Judge Walker. Put shortly, Art 8 was not a ground of appeal and, in those circumstances, Judge Walker did not err in law in failing to consider Art 8 of the ECHR.

Decision

48. For the above reasons, the First-tier Tribunal decision to dismiss the appeal under para 21 of HC 510 involved the making of an error of law. Its decision cannot stand and I set it aside.

49. I remake the decision, allowing the first appellant's appeal (and that of the second appellant as her dependant) under para 21 of HC 510.

Signed

A Grubb
Judge of the Upper Tribunal