IAC-AH-VP-V1

**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/12860/2014

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 21 January 2015** | **On 02 February 2015** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MONSON**

**Between**

**KORHAN TOPAL**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**
For the Appellant: Mr Sellwood, Counsel instructed by Ozkutan Solicitors
For the Respondent: Ms Vidyadharan, Specialist Appeals Team

**DECISION AND REASONS**

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge E.B. Grant sitting at Hatton Cross on 13 October 2014) dismissing his appeal against the decision by the SSHD to refuse to grant him ILR as a self-employed businessman under the Ankara Agreement. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the appellant requires anonymity for these proceedings in the Upper Tribunal.

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2. The ground of refusal was that the appellant had not shown that he had genuinely established a business with his partner as the owner and manager of Eroma Café through a company called UM & KO Eroma Ltd, or a parallel property management business managing the three flats above the café under the auspices of UM & KO Property Ltd. The respondent disputed that the companies had acquired legal ownership of the premises or the café business, and she was not satisfied that the appellant's part of the business did not amount to disguised employment.

3. In her typed record of proceedings, Judge Grant observed that the two bundles of evidence served by the appellant's solicitors were the size of two telephone directories, and she asked Miss Daykin of Counsel to mark up the relevant documents.

4. In her subsequent decision, Judge Grant found that the concerns raised by the SSHD had not been adequately addressed, and the appellant had not discharged the burden of proving that he met the requirements of paragraph 21 of HC 510.

**The Grant of Permission to Appeal**

5. On 12 December 2014 First-tier Tribunal Judge J M Holmes granted permission to appeal for the following reasons:

> The decision makes no reference to the decision in **EK Turkey [2010] UKUT 425**, although this was relied upon by Counsel for the appellant, and arguably was based on very similar factual circumstances. Arguably, had the judge followed the guidance therein she would have allowed the appeal under paragraph 28 of HC 510.
>
> Moreover it is arguable the judge's approach to the evidence was so flawed as to amount to a material error of law. Rather than use, or comment upon, the analysis of payments towards payment of the purchase price of the leasehold evidence and the documents in evidence compiled by the appellant's Counsel and confirmed in evidence by the appellant, the judge appears to have tried to prepare her own computation after the hearing. Arguably she has erred in doing so, because she has omitted relevant payments, and included irrelevant payments in her calculation, and has given the appellant no opportunity to correct, or comment upon, her calculation.

**The Hearing in the Upper Tribunal**

6. For the purposes of the hearing in the Upper Tribunal the appellant's solicitors filed a notice pursuant to Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 asking the Upper Tribunal to consider evidence that was not before the First-tier Tribunal.

7. The new evidence included a deed of assignment and a letter from Barclays Bank confirming that the appellant and his partner were signatories to the company bank account. The assignment made on 19th January 2015 was between Veyis Acil (assignor) of the one part, and the appellant and his partner (the assignees) of the other part. In the preamble, the assignor is described as "now carrying on and has hitherto carried on in or upon the premises" the business of a café known as Eroma.

The preamble further states the assignor had agreed with the assignees for the sale to them the goodwill of the business for the price of £60,000.

8. Mr Sellwood agreed that proof that the appellant was a signatory to the business bank account could have been provided earlier. But he submitted that it was not a requirement of the relevant Rule that such evidence be provided.

9. I pointed out that the implication of the deed of assignment now sought to be relied on pursuant to Rule 15(2A) was that hitherto the business of the café had been carried on by the assignor, Mr Acil, not by the appellant and his business partner. Mr Sellwood said that the preamble was not factually correct.

10. I reviewed the documents that had been before the judge. It emerged that there was a discrepancy between the appellant's bundle in Mr Sellwood's possession, and the appellant's bundles in my file. The appellant's bundle in Mr Sellwood's possession combined the two bundles referred to by the judge into one single giant bundle (over 800 pages long), and it had different coloured flags to show different sets of transactions. The transactions highlighted in bold in the one page schedule referred to by Miss Daykin at the hearing had been flagged up in Mr Sellwood's bundle. But it not been flagged up in the judge's (second) appellant's bundle which ran from pages 609 onwards. The only transactions which had apparently been highlighted for the judge by purple post-it notes were the payments to Mr Kershaw, the freeholder, for rent.

11. I then reviewed the documents which were cross-referenced in the one page schedule relied on as showing payments towards the purchase of the lease. Most of the transactions relied on were debits from a company bank account, and they did not detail the purpose for which the money was being paid to either Mr Acil or his brother.

12. Mr Sellwood submitted that this did not matter, as the appellant only needed to show on the balance of probabilities that he was and had been genuinely in business at the date of the hearing before the First-tier Tribunal.

13. Ms Vidyadharan submitted that there had been no material error on the part of the judge, who had been misdirected by Counsel to the wrong evidence. Furthermore, the evidence in support of the alleged payments towards the lease was equivocal.

**Discussion**

14. Paragraph 28 of the 1973 Rules provides as follows:

> A person who is admitted in the first instance for a limited period and has remained here for four years in approved employment or a businessman or a self-employed person or is a person of independent means may have the time limit on his stay removed unless there are grounds for maintaining it. Applications for removal of the time limit are to be considered in the light of all the relevant circumstances including those set out in paragraph 4.

15. In the **EK (Ankara Agreement – 1972 Rules – construction) Turkey [2010] UKUT 425 (IAC)** the Tribunal held that paragraph 28 of HC 510 does not require a person who had been given leave as a businessman to demonstrate as a precondition of the exercise of discretion that in each or any year in which they have been given leave in that capacity they have complied with particular requirements of paragraph 21. Those requirements are directly relevant only to the first application for permission to remain or the first extension of stay.

16. At paragraph 24 of **EK** the Tribunal said:

> We would accept the submission that in an extreme case where the evidence demonstrates that the business for which the applicant had been given permission to remain was completely dormant or generated such marginal funds as to be incapable of supporting anybody in the United Kingdom, the Home Office might well be able to identify that consideration as a highly relevant factor to the exercise of discretion to grant or refuse indefinite leave to remain. Such a decision would not be expressed in terms of failing to satisfy a requirement of the Rules but the identification of a particular factor why discretion to grant indefinite leave was not considered appropriate. In such case on appeal it would be open to the Immigration Judge to see whether discretion should have been exercised differently in all the circumstances of the case. In recognising this, a pragmatic application of the principles and Rules is called for. It was certainly the case in 1972 and for a number of years thereafter the Home Office recognised that businesses often needed some sign to turn a profit and losses in the early years were not inconsistent with a business that met the policy and purposes 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.

17. Although the grounds of refusal of the application for ILR were presented in terms of a failure to meet two particular requirements of paragraph 21, on analysis the Secretary of State was postulating an extreme case as envisaged in paragraph 24 of **EK**. The business for which the appellant had been given permission to remain had disintegrated, and it was not accepted by the Secretary of State that the appellant had genuinely established a new business in substitution for the old one. Since this was the nature of the factual dispute between the parties, I do not consider the judge's failure to direct herself by reference to paragraph 28 (rather than by reference to paragraph 21) was material.

18. Turning to the other error of law challenge, I find that the judge made an understandable mistake of fact. Her mistake is understandable as she had been provided with over 800 pages of documents, most of which did not speak for themselves. I have no doubt that the mass of documentation was compiled and presented in good faith, but the net result was to a significant degree obfuscatory rather than illuminating. The judge was not assisted by only having the rental payments flagged up in the first bundle which ran to over 600 pages; whereas the key documents in the second bundle relied on as evidencing payments towards the purchase of the lease were not flagged up for the judge.

19. Nonetheless, it is apparent from the judge's typed Record of Proceedings that she had the one page schedule relied on by Counsel as tabulating the payments that had

been made towards the purchase of the lease; and this document had cross-references to pages in the second bundle. So, contrary to the judge's finding in paragraph 11, the appellant had in fact provided documents to support his claim that he and his partner had made payments towards the purchase of the lease of the business premises from the leaseholder Mr Acil.

20. The more difficult question is whether the judge's mistake of fact on this question translates into a material error of law. While the perceived lack of supporting documentary evidence for this aspect of the appellant's claim undoubtedly coloured the judge's view of the appellant's general credibility, it was not the only ground upon which she found against him.

21. Firstly, there was a simple point relied on by the respondent in the refusal letter, and echoed by the judge, that the appellant and his business partner did not actually own the premises where the café was located, and were not actually the owners of the business which was carried on at the café. I do not understand this to be disputed. In essence, the appellant's case was that he was carrying on the business of a café owner at the premises, and had been doing so for three years, although the formal transfer of the business, and the formal assignment of the leasehold of the premises, had not yet taken place because the appellant and his partner had not yet paid over all the money required – but in the case of the lease, they were now only about £5,000 short of the price demanded. The respondent's argument, which it was open to the judge to accept, was that the appellant could not be treated as having established a business of which neither he (nor the company of which he was a director) was the legal owner.

22. Secondly, it was open to the judge to place considerable weight on the absence of any confirmatory evidence as to who controlled the company bank accounts. A confirmatory letter from Barclays Bank to this effect had been requested by the Home Office on 11 February 2014, and the respondent had placed great stock on its non-production in the refusal letter. So the fact that the appellant had served a tsunami of evidence by way of appeal which did <u>not</u> include the requested letter from Barclays Bank was calculated to increase suspicion, not to allay it.

23. Thirdly, the judge was not in fact wrong when she said in paragraph 15 that the financial evidence placed before her did not demonstrate that the appellant had made part payments for the *business*. The schedule relied on by Miss Daykin of Counsel related to the purchase of the *lease*, not to the purchase of the *goodwill* in the business which is covered by the deed of assignment signed in January 2014. I note that the purchase price for the sale of the goodwill in the business is £60,000, whereas the schedule relied on by Miss Daykin cross-refers to documentary evidence of the payment of monies with regard to the purchase of the lease at a price of £100,000. So there are two entirely different transactions, for which the total bill is £160,000, not £100,000.

24. Moreover, as I canvassed with the parties at the hearing, while it can be seen in the bank statements that there are debits in favour of Mr Acil or his brother, the bank

statements entries do not state the *purpose* for which monies from the company bank account are being paid over to these individuals.

25. The case of the respondent was not that there was no business going on at the premises, but that the appellant had not shown that he was running the business or that he was the owner of it; as opposed to being under the direction and control of Mr Acil and/or another unidentified person. The appellant's account in his oral evidence of what he did on a day-to-day basis is entirely consistent with the respondent's characterisation of him as being in disguised employment under the direction of Mr Acil.

26. I accept that overall the evidence sought to be adduced under Rule 15(2A) advances the appellant's case. (The one respect in which it undermines it is that the deed of assignment refers to Mr Acil carrying on the business of the café at the date of the assignment, which is inconsistent with the proposition that the appellant and his partner took over the running of the business from Mr Acil three years ago.) But, as Mr Sellwood acknowledged, in order to rely on the new evidence as bolstering his case in this appeal (as opposed to being constrained to rely on such evidence in a fresh application for ILR), the appellant needs first to establish that there was procedural unfairness or an error of law in the decision of the First-tier Tribunal such that it should be set aside and remade.

27. On the evidence that was made available to the First-tier Tribunal, I find that the judge has given adequate reasons for dismissing the appeal, and her mistake in confusing the documentary evidence relating to rental payments with the documentary evidence relating to payments towards the purchase of the lease was not material.

**Notice of Decision**

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

No anonymity direction is made.

Signed Date **30 January 2015**

Deputy Upper Tribunal Judge Monson