



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/28996/2013

THE IMMIGRATION ACTS

Heard at: Field House
On: 12th February 2015

Decision Promulgated
On 25th June 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

Adem Tesdemir
(no anonymity direction made)

Appellant

And

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Ms Faryl, Counsel instructed by VC Legal (UK)

For the Respondent: Mr Avery, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of Turkey date of birth 10th February 1982. He has permission¹ to appeal against the decision of the First-tier Tribunal (Judge Edwards)² to dismiss his appeal against the Respondent's decisions to refuse him a resident permit confirming his right of residence under the Turkey-EEA

¹ Granted by First-tier Tribunal Judge Scott-Baker on the 21st October 2014

² Determination promulgated 6th August 2014

Association Agreement and to remove him from the United Kingdom pursuant to s47 of the Immigration Asylum and Nationality Act 2006³.

The Decision of the First-tier Tribunal

2. The Appellant claimed to be the proprietor of a business known as “Café Delight” in Derby. The matter in issue was whether he was in fact the proprietor or whether this was “disguised employment”. The First-tier Tribunal found that it was disguised employment and on that basis had dismissed the appeal. The reasons given for that conclusion were:

- i) that the “fixed and restricted” hours worked by the Appellant were more akin to that of an employee than those of an owner;
- ii) the Appellant had never bought any equipment for his café and had hardly changed the menu since he acquired it;
- iii) he had not thought about how much it might be worth;
- iv) he paid his staff cash in hand;
- v) he had only ever changed the price of one thing on the menu;
- vi) he had “no real idea of any planning for the business”;
- vii) on his son’s birth certificate his occupation had been described as “coffee shop chef”;
- viii) his evidence was vague.

3. There had been evidence that the Appellant held a sub-lease on the café premises, taken from a Mr Caglar who was the lease holder. Of this Judge Edwards found:

“25. There is also a misunderstanding as to the effect of the sub-lease. The appellant seems to identify the sub-lease with the actual business, as indeed did Miss Faryl. That is not correct. It may be an asset of the business, but it is not the business itself. It is therefore clear to me that Mr Caglar retains an interest in the business”.

4. In respect of Article 8 the Tribunal found that the Appellant did not qualify for leave to remain either under paragraph 276ADE or Appendix FM. It noted that the Appellant has a British wife and child who is still a “babe in arms” who could “easily adapt to and flourish in Turkey”. It would not be unreasonable to

³ Decision dated 1st July 2013

expect the child to leave the UK. The appeal was thereby dismissed on all grounds.

Grounds of Appeal

5. The grounds of appeal are that the First-tier Tribunal erred in the following material respects:
 - i) The dispute between the parties, as articulated in the Secretary of State's refusal letter was whether the Appellant could be said to be the owner of the café when he was not the owner of the property from which it operates. It is submitted that the First-tier Tribunal failed to resolve that question of fact;
 - ii) The determination gives rise to "real concern and unease" in that it appears to omit reference to evidence capable of establishing that the Appellant is in fact the owner of Café Delight. That failure, it is submitted, demonstrates a "clear lack of impartiality". For instance:
 - a) In reference the hours worked by the Appellant the determination misrepresents his evidence. What he actually said was that he does *not* work six days per week eight hours a day and that sometimes he leaves staff in charge, for instance when his child was sick;
 - b) The determination refers to the fact that the Appellant pays his employees "cash in hand" but not to the fact that he also issues them with payslips;
 - c) The Appellant's evidence that he does not receive a payslip himself is not recorded, nor is the evidence that his pay varies depending on how the business is doing;
 - d) The Appellant had said that he had changed the prices on the menu - he had mentioned one item in response to a specific request to give a single example;
 - iii) The Article 8 assessment is "perfunctory and inadequate", there being a failure to consider s55 of the Borders, Citizenship and Immigration Act 2009 or the fact that the Appellant's wife was pregnant at the date of the appeal.
6. In her oral submissions Ms Faryl reiterated that in fact the only reason given by the Respondent had been that the Appellant did not own the building. She submitted that this was the only matter that required the Tribunal's attention. The analysis of this question at paragraph 25 of the determination was difficult to understand.

The Response

7. The Respondent's Rule 24 response is dated 11th November 2014. This submits that the Judge gave clear reasons why he did not accept that the Appellant was running this business. In his oral submissions Mr Avery points out that the evidence that is said to be omitted is not particularly relevant because it would all equally be capable of establishing that the Appellant is the manager of the café. As for Article 8 there was very little evidence for him to go on.

Error of Law

8. The Respondent had put in issue whether this was a real business or disguised employment. The refusal letter had doubted that the Appellant owned this café because he did not own the building. The Tribunal had dealt with this matter at paragraph 25, cited again here:

"25. There is also a misunderstanding as to the effect of the sub-lease. The appellant seems to identify the sub-lease with the actual business, as indeed did Miss Faryl. That is not correct. It may be an asset of the business, but it is not the business itself. It is therefore clear to me that Mr Caglar retains an interest in the business".

9. In the course of her submissions Ms Faryl made three complaints about this.
10. The first is that the Tribunal should simply have made findings on this point and that would have resolved the matters in issue. She suggested that since this was the only matter raised in the refusal letter that was the only point that the determination needed to address. I do not agree. Where the nature of an applicant's relationship with a business is put in issue the Tribunal is entitled, indeed obliged, to look at all of the evidence in the round: see Akinci (paragraph 21 HC 510 - correct approach) [2012] UKUT 00266(IAC).
11. The fact that the determination does not set out her submission on this matter is the second complaint. That was that there are plenty of small businesses which operate from buildings leased from others. The refusal letter was illogical to suggest otherwise. That is quite true, and it is a point that the Tribunal has not addressed. I am not however satisfied that paragraphs 24-25 had very much to do with the First-tier Tribunal's decision. Unlike the author of the refusal letter Judge Edwards has not treated the matter of ownership as determinative. It would appear from the determination that these paragraphs were inserted only in response to Ms Faryl's submission that the fact that the Appellant had taken a sub-lease meant that he must be running a business from there. I agree with Judge Edwards that such a submission would not be well founded. It would be one of a number of relevant considerations, but would not on its own be capable of proving that the Appellant is in fact the proprietor of Café Delight.

12. The third complaint is that paragraph 25 does not really make any sense. I agree. The Judge is quite correct to say that the sub-lease should not be equated with the actual business, but it is not clear how he went from that to the finding that “Mr Caglar retains an interest in the business”. Mr Caglar may be the sub-lessor, but that does not mean that he has any interest in the café itself. Whilst I struggle to understand the logic of paragraph 25, I do not see that it had any significant impact on the overall reasoning of the determination. That is because the core of the decision is to be found in the paragraphs that follow.
13. This brings me to the second ground of appeal. That is, in essence, that the determination is selective with the evidence. There are a number of matters, capable of being weighed in the Appellant’s favour, which have not been recorded or considered. At the hearing I had regard to the Record of Proceedings and the representatives very helpfully read from their own notes. Mr Avery agreed that the points set out in Ms Faryl’s grounds (summarised above) were substantially in accord with the HOPO’s record of the hearing. Having read the typed note she supplied, I find that the determination does not set out that evidence in full, and in places contains inaccuracies. In particular

- i) Paragraph 18(b) records the evidence that the Appellant works eight hours per day or less, six days a week. At paragraph 26(a) the Tribunal finds that these hours are “more akin to those of an employee to those of an owner”. This finding cannot stand since it is agreed that what the Appellant actually said was “I *don’t* work 6 days, not 8 hours everyday. Because child not well, sometimes I leave staff in charge. I don’t work more than eight hrs” [my emphasis].
- ii) Paragraph 19(d) records the evidence that the Appellant has altered the price of one item on the menu. Paragraph 26(b) cites this evidence as a reason for rejecting his evidence that he is the proprietor: “he has, apart from one isolated instance, never changed the menu”. This finding is not sustainable since the actual evidence (reproduced from the agreed record) was:

Since you had the business have you increased or reduced the prices?	Yes
Can you give me an example that you increased or decreased?	I changed the breakfast to £5.20 and since then it started

It is apparent from this exchange that the First-tier Tribunal has misunderstood the evidence. It was not one “isolated instance”, it was *an* example.

- iii) At paragraph 18(a) the determination records that the Appellant’s evidence was that he had “no idea” how much the business was worth but if he were to sell it he “would rely on the purchaser’s estimate”. This is found, at 26(c), to be “incredible”. The agreed record shows that the exchange was markedly different:

How much would you say business worth today?	I rent it for 3,000
You can't sell your business, is that right?	I'm not thinking about selling
Suggest you don't know how much its worth?	Its not I don't know I rented for 3 years at the end of the day if I would sell I would talk to people of how much its worth

The Appellant does not state that he has “no idea” what his business is worth, or that he would rely on the purchaser to name a price. He said that he was not thinking of selling but that if he was, he would take advice.

- iv) The grounds further point out that paragraph 19(b) appears to raise some doubt about deposit of £3000 made into the Appellant's current account: “I was told that it was from a savings account but no statement of such an account has been provided to me”. A statement relating to the savings account was in fact before the Tribunal, showing the withdrawal of the £3000 [at page 107 Appellant's bundle].
14. As Mr Avery points out, these were not the sum total of the Tribunal's findings. Particular reliance is placed on paragraph 27 in which the Judge finds “of considerable significance” the fact that the Appellant's occupation is given on his child's birth certificate as “coffee shop chef”. Mr Avery further asks me to find that none of the actual evidence was capable of showing the Appellant to have been the owner as opposed to a manager.
15. I have considered Mr Avery's submissions carefully. I am not however satisfied that the determination can stand. Where the determination gives seven reasons for finding against the Appellant, and at least four of these are based on a misunderstanding of the evidence, the overall reasoning must be infected. I cannot be satisfied that the decision would have been the same if the First-tier Tribunal had had regard to the actual evidence. For that reason the determination must be set aside.
16. Ground 2 having been made out, I need not deal with the determination's assessment of Article 8.

The Re-Making

17. The parties were in agreement that if error were to be found in the determination, I should remake the decision on the evidence before me.
18. It is the Appellant's case that he is the owner of Café Delight. The Respondent's refusal letter finds that the Appellant has failed to provide “convincing” evidence that this is the case, but this is not the appropriate standard: he must establish that this is his business on the balance of probabilities.

19. The Respondent's analysis of the application was based on a search conducted on 30th March 2012 with the land registry (Nottingham Office) which shows that the title absolute to the property is held by Mustafa Caglar; there were no entries for registered leases, sub-leases or licence agreements. The conclusion is drawn that the Appellant has no interest in the property; ergo he has no interest in Café Delight.
20. The Appellant adopted his witness statement dated 19th February 2014. He agrees that the Land Registry will not have a record of the sub-lease he agreed with Mustafa Caglar, because he is effectively his tenant: as it is only of three years duration it does not have to be registered. He points out that when he made his application he provided various pieces of evidence, which he now relies upon to show that he is the person who is running the café. This material included his bank statement showing a transfer withdrawal of £3000 which is said to be the deposit paid for the business in December 2012, invoices addressed to him at the café for payment of council tax and landfill tax, a Certificate of Employer's Liability Insurance issued by Maltings Insurance in the name of "Adem Tasdemir Trading as Café Delight", various utility bills also in that name, and a letter dated 9th April 2013 from HMRC, addressed to the Appellant in the following terms: "our records show that you are a new employer but you have not paid any PAYE". He also provides:
- i) A letter dated 22nd January 2013 from A Dervish Accountants which states that the Appellant has been a "self employed business entrepreneur since 1st December 2012 trading under the name of Café Delight"
 - ii) Commercial Rent Agreement dated 1st December 2012 showing an agreement between the Appellant and Mustafa Caglar to rent the shop at 51 Oxford St. It has been drawn up by Blunts Solicitors of Newcastle-under-Lyme. The tenant is the Appellant and he is identified as "trading as Café Delight". The agreement is that he will pay Mr Caglar £13, 400 per annum, accompanied by bank statements showing transfers, and receipts where the rent has been paid in cash;
 - iii) Lloyds TSB statements in the name of the Appellant "T/A Café Delight" which show him to be paying utility bills from that account;
 - iv) A witness statement dated 19th February 2014 from Mustafa Caglar confirming that he had to stop running the café due to ill health and that in December 2012 he signed a three year rental agreement with the Appellant. Mr Caglar provides a copy of a certificate signed by his GP confirming that he is not fit to work;
 - v) Birth certificate of the Appellant's son, dated 12th March 2015, in which he is said to be a 'coffee shop owner'.

21. The file also contains a witness statement from Wendy Gilbert of the HMRC. This was produced by the Respondent. It shows that when Ms Gilbert ran a check on the Appellant's records they showed that since the 1st December 2012 he has been registered as self-employed running a café called Café Delight and that he declared a turnover of £59,162 in 2012-2013.
22. It is agreed between the parties that any interest that the Appellant might have in the property accommodating Café Delight is not registered with the Land Registry. It is the significance of that fact which is in issue. The Appellant's case is that as a tenant of only three years there was no legal requirement to register the commercial rent agreement he has signed with Mr Caglar. Neither party has provided me with any legal authority one way or the other about this. What I have got is a good deal of evidence, dating back to December 2012, connecting the Appellant with Café Delight. Mr Avery submits that this evidence is of little assistance to me since it is all equally capable of showing him to be the manager, employed by Mr Caglar. I do not agree. I do not consider that an employee would take out an insurance policy in his own name accepting employer's liability for others working, or indeed visiting, the shop. I do not accept that a manager would register as the owner of the business with the HMRC and so make himself liable for the not insubstantial tax that is owed. All of the evidence before me, set out above, points one way. All of the evidence bar one document.
23. That document is the birth certificate of the Appellant's eldest son, who was born in October 2013. When the Appellant registered his birth in November of that year he told the Registrar that his occupation was 'coffee shop chef'. This was a matter that the First-tier Tribunal placed some weight on. I see from the record of proceedings (and indeed Counsel's note, agreed as broadly accurate by Mr Avery) that this was not something which formed any part of the Respondent's case, either in cross-examination or in submissions. I have not therefore received any explanation from the Appellant about why he might have used the term 'chef' rather than 'owner'.
24. I have considered all of this evidence in the round. I have weighed the matter of the birth certificate against the Appellant, and I have taken the submissions made on behalf of the Respondent, in the refusal letter, by Mr Tan at first instance and by Mr Avery before me, into account. Having done so I find myself satisfied, on the balance of probabilities, that the Appellant is indeed the proprietor of Café Delight, a coffee shop which he leases from Mr Caglar. The fact that the Land Registry has not been notified about this rental agreement does not outweigh the remainder of the evidence. I therefore allow the appeal.

Decisions

25. The determination of the First-tier Tribunal contains an error of law and it is set aside.

26. I re-make the decision in the appeal by allowing it.

27. I make no direction for anonymity.

Deputy Upper Tribunal Judge Bruce
11th May 2015

Fees

The appeal has been allowed, largely on evidence that was before the Respondent at the date of decision. I therefore make a full fee award.

Deputy Upper Tribunal Judge Bruce
11th May 2015