Upper Tribunal
(Immigration and Asylum Chamber)

EK (Ankara Agreement – 1972 Rules – construction) Turkey [2010] UKUT 425 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 2 November 2010	.....

Before

MR JUSTICE BLAKE, THE PRESIDENT
SENIOR IMMIGRATION JUDGE DEANS

Between

EK
EK

Respondents

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

Representation:

For the Appellant: Mr J Gulvin, Home Office Presenting Officer
For the Respondent: Ms E Daykin, Counsel instructed by Immigration Point Legal Services

1. *There is nothing in the 1972 Immigration Rules (HC 510) that provides that a person who cannot come within one of the categories of the Immigration Rules is to be refused an extension of stay for that reason alone. Rule 4 sets out the "main categories" of people who may be given leave,*

recognising the possibility that there are other categories not specifically set out that can be dealt with on a discretionary basis. Accordingly, it was open to the Home Office to grant an extension of stay as a businesswoman to someone who had entered as an au pair. The finding in OT (Turkey) [2010] UKUT 330 (IAC) that HC 510 prohibited switching to business status by anyone other than a visitor is not considered correct. (See also now LE (Turkey) [2010] CSOH 153).

2. *Paragraph 28 of HC 510 does not require a person who had been given leave as a businessman to demonstrate as a pre-condition for the exercise of discretion that in each or any year in which they had been given leave in that capacity they had complied with particular requirements of paragraph 21. Those requirements are directly relevant only to the first application for permission to remain and the first extension of stay.*

3. *There is no precise code in HC 510 distinguishing between maintenance and accommodation and precluding third party contributions to living expenses.*

DETERMINATION AND REASONS

1. This is the Secretary of State's appeal against the decision of Immigration Judge Callow given on 3 September 2010 whereby he allowed the appeal of the appellants against the Home Office decision 1 February 2010 refusing indefinite leave to remain.

2. The appellants before the Immigration Judge are Turkish nationals and, for convenience, we shall continue to call them the appellants in this determination. The second appellant is the husband of the first and for present circumstances the outcome in his case depends on the result of the appeal of his wife. The first appellant (hereafter the appellant) came to the United Kingdom in 2002 with entry clearance to work as an au pair. On 3 January 2006 she was given leave to remain as a self-employed person pursuant to the provisions of the EC Turkey Association Agreement also known as the Ankara Agreement of 1963.

3. The appellant established herself as a self-employed provider of domestic services as cleaner, housekeeper and baby-sitter. After that initial grant of leave the second appellant was granted entry clearance as a spouse to join his wife in April 2006 with leave to remain until the same date in January 2007. The second appellant was admitted without terms restricting his ability to take employment. The leave to remain on both appellants was extended on 21 April 2007 until 3 January 2010.

4. In October 2007 the appellants purchased the flat which they currently live on a Halifax Mortgage. In 2010 the appellants applied for indefinite leave to remain on the basis that they had remained in the capacity as self-employed business woman and spouse for four years. In her application

the appellant submitted information from her accountant giving her business earnings between 2007 and 2010. The value of her gross receipts to 5 April in those years were as follows; 2007 £12,790; 2008 £10,795; 2009 £11,855. The accounts show that the appellant claimed expenses for premises costs, general administrative expenses and travel, subsistence, legal and professional costs that reduced her net profit in each of the three years to £10,478, £9,029 and £9,752 respectively. In Section 5 of the application form the appellant was invited to give details of personal and business expenditure. She estimated that her personal expenditure on mortgage, tax, fuel bills, food and travel was some £1,584 per month and her business expenditure was some £290 per month.

5. The application for indefinite leave was refused on the basis that the appellant could not met the requirements of the after-entry business provisions of the Immigration Rules as they stood in 1973. The notice stated:

> "The Secretary of State is not satisfied that you are able to maintain and accommodate yourself and your spouse while you are in the United Kingdom as a self-employed individual".

Further details were given of that conclusion in a letter of the same date in the following terms:

> "You have provided yearly accounts from 2007 to 2009 which indicates a staple net income of £9,029 and £9,752, however your early expenditure amounts to nearly £16,968 therefore the Secretary of State is not satisfied that you can maintain and accommodate yourself and your spouse whilst you are in the United Kingdom. Therefore you do not satisfy the requirement of the Immigration Rule for this category and it has been decided to refuse your application."

6. This application fell to be judged against the terms of the 1973 Immigration Rules as a consequence of Article 41 of the Additional Protocol dated 1972 to the Ankara Agreement. Article 41 provides as follows:-

> "1. The contracting parties shall refrain from introducing between themselves any new restrictions on the freedom of establishing and the freedom to provide services."

7. In Case C-37/98 R v The Secretary of State for the Home Department ex parte Savas [2000] ECR I-2927 11 May 2000 the Court of Justice concluded that the terms of Article 41 of the Additional Protocol were directly effective in the following terms:

> "46. As its very wording shows, this provision lays down, clearly, precisely and unconditionally, an unequivocal "stand still" clause, prohibiting the contracting parties introducing new restrictions on the freedom of establishment as from the date of entry into force of the additional protocol.

> 47. The Court has already held that Article 53 of the EC Treaty… prohibiting Member States from introducing any new restrictions on the rights of nationals of other Member States to establish themselves in their territories contains an obligation entered into by the member state which amounts in law a duty not to act. The Court has held that such an express prohibition, which is neither subject to any conditions, nor, as regards its execution or effect, to the adoption of any other measure is legally complete in itself and therefore capable of producing direct effects on the relations between member states and individuals (Case 6/64 *Costa v Enel* [1964] ECR 585 at page 596).
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> 48. Since the wording of Article 41(1) of the Additional Protocol is almost identical to that of Article 53 of the EC Treaty it must be regarded as being directly applicable for the same reasons. However, Article 41(1) of the Additional Protocol prohibits the introduction of new national restrictions on the freedom of establishment and right of residence of Turkish nationals as from the date of entry into force of that protocol in the host Member State. It is for the national court to interpret domestic law for the purposes of determining whether the rules apply to the applicant in the main proceedings are less favourable than those which are applicable at the time when the additional protocol entered into force."

8. It was common ground before us that the rules that were applicable in the present case were the Statement of Immigration Rules of Control after Entry laid before the House of Commons on 23 October 1972 HC 510.

9. Paragraph 28 of those Rules under the heading "Settlement" provides as follows:

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

Paragraph 4 provides:

> "The succeeding paragraphs set out the *main* categories of people who may be given leave to enter and who may seek variation of their leave, and the principles to be followed in dealing with their application, or initiating any variation of their leave. In deciding these matters account is to be taken of all relevant facts; the fact that the applicant satisfies the formal requirement of these rules to stay or further stay in the proposed capacity is not conclusive in his favour. It will for example be relevant whether the person observed the time limit and condition 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."
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> (Our emphasis)

10. In the present case the immigration summary reveals that the only conditions attached to the stay of the appellants from 2006 onwards was not to have recourse to public funds. It is not suggested that they have had such recourse. Accordingly they have not breached the terms of their leave to enter or remain; they have resided here lawfully throughout their stay and have been doing that which they have been given permission to do. No discretionary factor exists to indicate refusal.

11. The IJ concluded that there was no requirement set out in the settlement rules on the appellant to demonstrate that she had supported and/or continued to support herself and any dependants from the profits of her business, but if there was such a requirement he was satisfied on the uncontested evidence submitted that she had done so. In reaching that conclusion the IJ no doubt had regard to the grounds of appeal which pointed out that the second appellant was earning £13,000 a year as a worker giving the couple a total income of £22,772.

12. There was no response by the Home Office to these grounds of appeal. There was no appearance by a presenting officer at the appeal and accordingly no cross- examination or challenge of either appellant as to their living arrangements or family budget.

13. On 15 September 2010 the Secretary of State sought permission to appeal against this decision essentially on two basis:-

    i) The IJ was wrong to conclude that there was no Immigration Rule requiring the appellant to demonstrate that she supported herself or any dependants from the profits of the business.
    ii) The IJ had failed to give sufficient reasons for his conclusion that the appellants were able to maintain and accommodate themselves.

14. On 28 September 2010 SIJ Waumsley considered that both points were arguable and added the observation that the respondent might want to consider whether the appellants were entitled to the benefit of the business provisions of HC 510 in any event as the first appellant had entered the United Kingdom as an au pair rather than a visitor and those rules made no provision for anyone other than a visitor to transfer to business: see the determination of the Tribunal OT (Ankara Agreement: Students, Businessmen, Workers) Turkey [2010] UKUT 330 (IAC).

15. Before us Mr Gulvin relied upon paragraph 21 of HC510. This provides as follows:

> "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 merit. Permission will depend on a number factors including evidence that the applicant will be devoting assets of his own to the business, proportional to his interests in it,

> that he will be able to bear his share of any liabilities that the business may incur, *and that his share of his 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 application is granted the applicant's stay may be extended for up to twelve 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 that he was admitted initially. "
> (Our emphasis)

16. Mr Gulvin submitted as follows. First, it was a requirement of the rules to obtain the original variation of leave to remain to establish oneself in business or self-employment that "his share of his profits will be sufficient to support him and any dependants". Second, if there was no ability to support oneself and any dependants from the profits of the business throughout the period of the four years that leave to remain as a businessman was given, that would be a relevant circumstance within the meaning of paragraph 28 and or paragraph 4. Accordingly the IJ was wrong to conclude that there was no requirement in the Rules for the business profits to support the appellant and her husband.

17. Further, Mr Gulvin submitted that since the appellant's personal expenditure exceeded the profits of her business she was incapable of satisfying the requirement that the profits were sufficient to support herself and any dependant. He acknowledged that the second appellant was entitled to work and there had been no Home Office dispute of the contention that he brought £13,000 to the family budget. He accepted that the decision maker was probably wrong to look at the net profits of the business when considering ability to support oneself from the business as some of the deductions in the business expenses were for accommodation, travel and legal expenses that were relevant heads of the personal and business expenditure disclosed in the application form. If attention is given to the net profit of the business, then items of personal expenditure and business expenditure from which deductions have already been made must be ignored and that reduces the gap between earnings and expenses significantly below the £7,000 odd identified in the decision letter.

18. Mr Gulvin also recognised that the Home Office had never challenged the appellants' ability to live modestly on the net profits of the business either when granting an extension of stay in 2007 or in response to the grounds of appeal in 2010.

19. We pointed out that if as a result of the husband's earnings both appellants decided to live at a higher standard of living than would otherwise have been the case if the husband had no earnings, that fact is no indication of an inability of the couple to live on the profits of the

business. The husband is entitled to contribute his earnings to the family budget to either decrease the need for profits from the business to support him or acquire a better standard of accommodation.

Conclusions

20. We conclude that even if the continued ability of the business to support the appellant and her husband were a relevant circumstance there was nothing wrong with the Immigration Judge's summary conclusion in favour of them. As the Home Office had chosen not to test their evidence it was bound by the finding of fact manifestly open to the judge on all material before him. The reasons for that conclusion were obvious once the husband's income could be taken into account as noted at [19] above. The second ground of appeal is not made out.

21. However, we also conclude that the IJ was right to find that there was no mandatory requirement in the settlement provisions in HC 510 for an applicant to substantiate that in each year since the grant of leave she had maintained herself and her dependants from the profits of the business. The contents of the Immigration Rules in 1972 were fundamentally different from the very precise scheme under the present rules and its predecessor for many years since about 1995.

22. Three differences can be noted here. First, there is nothing in HC 510 that provides that a person who cannot come within one of the categories of the Immigration Rules is to be refused an extension of stay for that reason alone. Indeed paragraph 4 of HC 510 says in terms that the following paragraphs set out "the main categories" of people who may be given leave, recognising the possibility that there are other categories not specifically set out that can be dealt with on a discretionary basis. Secondly, paragraph 28 does not in turn require a person who had been given leave as a businessman to demonstrate as a pre-condition for the exercise of discretion that in each or any year in which they have been given leave in that capacity they had complied with particular requirements of paragraph 21. Those requirements are only directly relevant to the first application for permission to remain as a businesswoman and the first extension of stay thereof. In terms the words look to the future "will" rather than the past "have". Thirdly, there is no precise code in HC 510 distinguishing between maintenance, accommodation and precluding third party contributions to living expenses.

23. In 1973 the Rules themselves were a open textured exercise in discretion in the round having regard to the general policy and particular factors identified; so was the practice in applying them: see R v Immigration Appeal Tribunal ex parte Joseph [1997] Imm AR 70 and on appeal Secretary of State for the Home Department v Joseph [1977] Imm AR 96. See also R v Immigration Appeal Tribunal ex parte Peikazadi (1979 to 1980) Imm AR 191 and the discussion in *Macdonald's Immigration Law*

and Practice, 1st Edition 1983 at page 199. The Ankara Agreement precludes the introduction of either stricter Rules or a stricter practice in the administration of the Rules.

24. We would accept the submission that in a extreme case where the evidence demonstrated 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 a 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 of the Rules is called for. 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 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.

25. We conclude that the Immigration Judge correctly construed the Rules in the case in the light of the background facts and the reasoned decision. The Home Office was not purporting to identify a relevant circumstance in the exercise of discretion but simply refused on the basis of a lack of satisfaction of a criterion it was not necessary for the appellant to satisfy under paragraph 28 HC 510. We conclude there is no material error of law in the construction of the rules and the first ground on which permission to appeal had been granted is not made out either.

26. The respondent did not accept the invitation of the SIJ to argue that the appellant should never have been granted an extension of stay as the businesswoman. Mr Gulvin was wise not to raise that issue with us. First, on the proper construction of paragraph 4 of HC 510 it was open to the Home Office to grant an extension of stay as a businesswoman to someone who had entered as an au pair. The Rules did not need to make express provision. This was a class other than the main one set out in paragraph 4 where it might be appropriate to grant such leave. Second, the Upper Tribunal in OT (Turkey) [2010] UKUT 330 (IAC) was principally concerned with whether breach of a condition prohibiting establishment in business was the equivalent of fraud, an issue that is now being revisited by the Court of Justice on a reference by the Court of Appeal. Thirdly, in so far as the panel in OT (Turkey) concluded at [27] of the determination that the 1972 Rules prohibited switching to business status by anyone other than a visitor that conclusion will need revisiting in the light of our

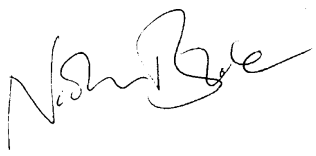
construction of the after entry rules and indeed the evidence of practice to the contrary in the present case.

27. Rule 21 refers to people admitted as visitors who may apply for consent to establish themselves to set up in business, and no reference is made to students or indeed au pair girls in so doing. Para 4 of the Rules makes it plain that an extension of stay can be granted to other classes of people if considered appropriate. This was not considered in OT (Turkey). There is nothing in the 1972 Rules requiring mandatory refusal of an application by a former student to remain in business, indeed a claim by a student who may have been in the United Kingdom many years may well be much more compelling than that of a mere visitor, the most transient class of immigrant.

28. As the Court of Justice said in Savas at paragraph 47 the standstill clause imposed a duty in law on a State not to act to make a practice any more restrictive than it had been in 1972. The introduction of mandatory grounds for refusal which did not appear in 1972 would therefore be prohibited in the case of Turkish nationals seeking to establish themselves in business or seeking extension of stay having been granted such permission. Indeed if, as the 1972 Rules and such surviving data as to practice suggest, students were not normally specifically prohibited from setting up businesses in advance of an application to do so, it may be that the introduction of more stringent practices in recent years are themselves a violation of the standstill agreement.

29. For the reasons given above, the two grounds of appeal identified in the Secretary of State's Notice of Appeal do not demonstrate that the IJ made a material error of law. We accordingly do not remake the decision and the Secretary of State's appeal is dismissed.

Signed



President of the Upper Tribunal,
(Immigration and Asylum Chamber)