Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/27881/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 11th June 2013	**On 25th June 2013**

Before

LORD BURNS SITTING AS A JUDGE OF THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGE D E TAYLOR

Between

ERKAN DURSUN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms G Peterson of Counsel, instructed by Fortis Rose Solicitors
For the Respondent: Ms M Tanner, HOPO

DETERMINATION AND REASONS

1. This is the Appellant's appeal against the decision of Judge Turkington made following a hearing at Hatton Cross on 7th February 2013.

Background

2. The Appellant is a citizen of Turkey born on 5th June 1981. He came to the UK as a visitor on 12th October 2011 stating that he wanted to visit his sister for two weeks.

3. On 26th July 2012 he applied for leave to remain in order to establish himself in business under the Turkey – European Community Association Agreement (the Ankara Agreement) which contains a standstill clause which means that the United Kingdom may not impose conditions for business applicants less favourable than were in force when the agreement came into being in 1973.

4. The application was therefore assessed in accordance with paragraph 21 of HC 510 which states 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 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 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 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 for which he was admitted initially."

5. The Appellant proposed to set up himself in business as an IT technician in North London. He employed a firm of accountants, AK Accounting, to devise a business plan and they produced a projected profit and loss account which estimated that in year one the business would generate sales of £39,000 and produce a net profit of £20,360.

6. The Appellant gave oral evidence to the judge about the proposed business. The judge recorded that he was not satisfied that the Appellant had shown that he had the necessary skills to be able to establish a

computer repair business in the UK and it was not apparent from the business plan where the sales figure of £39,000 had come from. He did not accept that the Appellant could turn over such a figure in a new business as a computer technician in a competitive market. He noted that the Appellant had not provided any official documentation from Turkey to support his employment record and was particularly concerned that, when he applied to come to the UK as a visitor, he had described himself as a paralegal and made no mention of being a computer technician.

7. He dismissed the appeal, concluding as follows:

> "I am satisfied that the Appellant has the necessary financial resources to set up in business but I am not satisfied that the Appellant has carried out sufficient research in order to ensure that the business is viable and I am not satisfied that the proposed business, if it were to go forward, would be sufficient to support the Appellant in the UK. I am not satisfied that the evidence shows that there is a genuine need for the services of the Appellant and his investment as a self-employed computer technician."

The Grounds of Application

8. The Appellant sought permission to appeal in grounds which were initially refused by Judge Frankish on 13th March 2013 but granted by Upper Tribunal Judge Grubb on 23rd April 2013.

9. In summary, the grounds argue that the judge misdirected himself when stating that he was not satisfied that the evidence demonstrated a genuine need for the services of the Appellant because the issue of a genuine need for services is only relevant when the applicant is seeking to join an existing business and relates to whether or not that particular business requires the investment and services of the applicant. It is not applicable to sole applicants seeking to establish a business as a sole trader.

10. Secondly, the judge misdirected himself in law and did not properly apply the Upper Tribunal decision in Akinci (paragraph 21 HC 510 – correct approach) [2012] 00266 (IAC) which was not considered by the Tribunal.

11. Paragraph 21 of Akinci states:

> "The correct approach to paragraph 21 of HC 510 invites consideration of the following matters:
>
> (i) The price for acquisition of a business should make commercial sense. An exaggerated price or one which does not reflect in any way the true value of the business may lead to a legitimate enquiry as to the truth of the transaction or the intentions of the parties.

(ii) 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 the business being acquired.

(iii) Even where a business is not expected to be profitable in the short term, revenue generated may well be enough to meet short time liabilities and provide enough for the applicant's support.

(iv) It is important therefore to identify the likely liabilities and what the applicant's personal needs are in order to see if they can be met out of cash flow or the initial investment. The test is not whether the applicant is going to get a return on his investment but whether what is projected is likely to enable the applicant to pay the bills arising and meet his living expenses.

(v) A plan is what it says it is: a projection of how it is anticipated things will work out with the possibility of making adjustments as the business gets underway. It is not a straightjacket.

(vi) In doubtful cases, an applicant's previous experience will help inform the decision maker whether a projected turnover is likely to be achieved, but such experience is not a prerequisite."

12. The Tribunal did not properly apply subparagraph (v) of Akinci. The test is not whether the Appellant will make a return, but whether he will be able to cover his liabilities and bills. His list of expenditure was modest. He had produced a price list, a detailed list of equipment required and a SWOT analysis which puts the business plan in line with Akinci.

13. Thirdly, the judge had unreasonably held the Appellant's previous application for entry clearance against him because he had not mentioned in that application that he also undertook work in the computer repair field. At the time, the Appellant did not know that he would be making an Ankara Agreement application and therefore simply included his employment as a paralegal, which was granted regardless of including his work as a computer repair technician. It was his entitlement to include information necessary at that time.

14. Fourthly, the judge had unfairly relied on matters not put to him in drawing his adverse conclusions. The Appellant had described a number of modules within his degree and confirmed that what he had learned in them had given him the requisite experience to establish a computer repair business. The Tribunal asked no questions of him with regard to his skills and experience and had made adverse findings, flying in the face of the unchallenged evidence given by him. There was no basis to conclude that the Appellant does not have the required skills and no basis for speculating that he could not be a computer technician simply because he worked as a paralegal.

15. Finally, the judge did not apply the proper standard of proof, which was not referred to in the determination.

Submissions

16. Mrs Peterson relied on her grounds and submitted that the judge did not undertake a proper analysis of whether the Appellant could genuinely set up in business as a computer technician. There was extensive material before him in relation to his training in Turkey and the judge had unreasonably concentrated on the application for entry clearance. In any event the provisions of paragraph 21 were sparse, and expertise was not a strict requirement. The judge had not followed the spirit of those provisions and had paid undue attention to unimportant factors, not taking into account cogent evidence.

17. Mrs Peterson relied on four letters from previous employers which the Appellant had produced confirming that he had acted as a computer technician. Furthermore, the Appellant had not actually filled in the application for entry clearance himself. She noted that none of his qualifications referred to law even though he had worked for four legal firms. Moreover his temporary graduation certificate dated 26th July 2004 from the Department of Industrial Automation following a two year programme referred to his graduating with the title of "technician."

18. Given the unexacting nature of the provisions of paragraph 21 the appeal should be allowed on the basis of the evidence already before us, or alternatively the matter could be reheard since she was in a position to take us to evidence demonstrating that the business was viable.

19. Ms Tanner defended the determination. She submitted that the judge had applied the principles of Akinci even though he had not referred to the case and had properly assessed whether the Appellant's previous experience made it likely that his business plan was realistic or not.

20. He had been quite correct to include in his assessment the evidence from the visit visa application forms. At question 49, the Appellant had been asked to give details of any additional jobs or occupations and he had replied "none". He was now seeking to rely on previous experience in Turkey, but the judge was entitled to observe that he had failed to provide any official documents of his employment.

21. She said that the judge had set out his concerns very clearly, in particular his doubts about where the turnover figure had come from, and had made a sustainable finding that there was no rational provenance for the figures relied on by the Appellant. There was no error in his overall conclusion that, even though he was satisfied that the Appellant had the financial resources, he did not have the necessary abilities to set up the proposed business.

22. By way of reply Mrs Peterson repeated that the judge had not properly applied the ratio in Akinci. There was nothing wrong in the Appellant being optimistic as to what his sales would be, and cogent evidence before the judge that the business was viable. He had identified three potential clients and had the financial resources to set the business up. It was not the Tribunal's function to act as a bank manager, but to decide whether the Appellant was in a position to meet his expenses without recourse to prohibited employment. There was a substantial body of evidence before the judge to show that he could.

Findings and Conclusions

23. It is right to acknowledge that the first ground is made out in that the judge was wrong to refer to the question of whether there was a genuine need for the Appellant's services in his final sentence of the determination. Such a requirement is only relevant when an Appellant is joining an existing business.

24. However, the error is immaterial because the judge did properly consider the application to set up a new business on its merits, as he was required to do by Paragraph 21. Ms Peterson is wrong to suggest that such an exercise is confined to the question of whether the Appellant had the requisite financial resources, since permission will depend on a number of other factors.

25. The key requirement in Akinci, to which we accept the judge was not referred, is that:

> "A business plan must be realistic, having regard to the nature of the enterprise."

26. The judge had clear concerns about whether the business plan was realistic for the reasons which he gave. He was entitled to express some doubts as to the rational provenance of the figures produced by AK Accounting. There is nothing in the documentation which justifies the projected sales of £39,000.

27. The remaining grounds also amount to a mere disagreement with the decision. The evidence before the judge was that the Appellant had denied having any additional job or occupation other than the full time employment, which he declared as a paralegal, in his application for entry clearance as a visitor. Plainly that evidence was relevant to the issue of the Appellant's experience in computer technology in Turkey.

28. Mrs Peterson appeared to be arguing in her submissions that the judge had failed to take relevant evidence into account, and cited four letters from previous employers in Turkey stating that the Appellant had acted as a computer technician. However, those letters were all considered by the judge at paragraph 15 of the determination. None were relied on in his visitor visa application, nor did he declare any income from those

additional sources in that application. Significantly, he had also failed to provide any official documentation to support his employment record. This is not therefore a question of the judge ignoring relevant evidence. He dealt with it and found it to be unreliable for the reasons which he gave.

29. No reference was made in the submissions to grounds 4 and 5 which have no merit. The Appellant's evidence of his skills and experience was not unchallenged. It was the central issue in the appeal. There was no obligation on the judge to put all of his concerns to him. With respect to the standard of proof, this is a very experienced judge who would have been aware of the correct standard to be applied and there is no evidence in the determination that he did not do so.

30. Read as a whole this is a thorough and well-reasoned determination. We conclude that the Appellant's grounds amount to a disagreement with the decision but disclose no error of law.

Decision

31. The original judge did not err in law and the decision stands.

Signed Date

Upper Tribunal Judge Taylor