IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Case No: CO/3228/2017
[2019] EWHC 2852 (Admin)

Cardiff Civil and Family Justice Centre
2 Park Street
Cardiff
CF10 1ET

11 July 2019

Before:
HIS HONOUR JUDGE KEYSER QC
(Sitting as a Judge of the High Court)

Between:

THE QUEEN on the application of
UMUT AYDOĞDU

Claimant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

Mr James appeared on behalf of the **Claimant**.
Mr Jowett appeared on behalf of the **Defendant**.

JUDGMENT

HHJ KEYSER QC:

1. The claimant, a Turkish national, was born on 3 September 1996 and is now aged 22. He entered the United Kingdom on 13 August 2016 on a six-month visit visa with leave to remain until 5 April 2017. The terms of the visa prevented him from doing paid or unpaid work.

2. On 20 January 2017, he was detained by immigration enforcement officers after being found apparently working at a barber's shop.

3. On 27 January 2017, he made an application for leave to remain under the European Community Association Agreement ("ECAA"). The United Kingdom has been in binding agreement with Turkey under the ECAA since it entered the European Economic Area in 1973. The ECAA prevents the UK from introducing restrictions that are less favourable to Turkish business people than those in force before 1973. The critical provision is article 41 of the Additional Protocol that was signed in 1970. Paragraph 1 of article 41 says:

> "The Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services".

4. The effect of article 41 was confirmed by the Second Chamber of the Court of Justice of the European Communities in a reference from the House of Lords in *Veli Tum & Dari, R (on the application of) (External relations) v Secretary of State for the Home Department* [2007] EUECJ C-16/05. I refer in particular to paragraph 69:

> "Having regard to all the foregoing considerations, the answer to the question referred for a preliminary ruling must be that Article 41(1) of the Additional Protocol is to be interpreted as prohibiting the introduction, as from the entry into force of that protocol with regard to the Member State concerned, of any new restrictions on the exercise of freedom of establishment, including those relating to the substantive and/or procedural conditions governing the first admission to the territory of that State, of Turkish nationals intending to establish themselves in business there on their own account."

5. The business entry provisions in force are accordingly those that were in force in 1973. For present purposes, the material rules are paragraphs 4 and 21 of HC 510. Paragraph 4 provides:

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

Paragraph 21, under the heading 'Businessmen and self-employed persons', provides in part:

> "People admitted as visitors may apply for the consent of the Secretary of State to their establishing themselves 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 proportion 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 account 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."

6. The claimant's application was supported by a business plan dated 24 January 2017 (after the date of detention) prepared by the claimant's accountant, Rayal & Co, in respect of a business, Moonlight Barbering, which was to be:

> "A small business start-up to be registered and legally structured as a sole trader with the HM Revenue and Customs. The proposed business will be owned and operated by Umut Aydoğdu who proposes to offer mobile hair services to the public in the convenience of their own homes or choice of venue. The services will include…"

The business plan then set out a list of barbering services. It continued

> "My following business plan will double up as a marketing strategy, a business management strategy, and a financial planning strategy which Umut Aydoğdu will be able to follow systematic plan for starting and maintaining his business and his potential clientele. Umut Aydoğdu will be investing £2,500 into Moonlight Barbering to cover the start-up costs associated with establishing his business and to cover his personal costs for a period of approximately one month if, of course, he can operate as a self-employed business person in the United Kingdom."

There then followed many pages of more detail concerning legal and Revenue requirements, business objectives and model, the nature of the services, market analysis, marketing strategy, personal background, and so forth, and then financial materials.

7. On 2 February 2017, the defendant refused the application. That is in substance the decision that is under review. The claimant sought administrative review of that decision, and by a further decision dated 8 March 2017 the defendant maintained the original decision.

8. A ground of challenge originally advanced relied on the Secretary of State's refusal to grant a right of appeal, but in the light of recent case law that challenge is no longer pursued. The challenge accordingly is in substance to the original decision of 2 February 2017.

9. The claim form was issued in the Upper Tribunal on 25 May 2017, and the case was subsequently referred to this court. Permission was refused on the papers by HHJ Bidder QC on 20 February 2019 but was granted at an oral hearing by UTJ Grubb sitting as a judge of this court on 27 March 2019.

10. The decision letter dated 2 February 2017 gave various grounds for the decision. It began with a reference to paragraph 4 of HC 510, part of which was set out. It then said, further to the highlighted section of paragraph 4 of HC 510: "Your application is refused because you have breached immigration law in the following regard." There were then set out what amount to three distinct though related reasons or grounds for refusal. At the conclusion of those grounds, to which I will turn presently, the decision letter said:

> "Therefore, it would be undesirable to permit you to remain in the United Kingdom in light of your conduct and character. The Secretary of State, having taken into account all the circumstances of your case, is therefore not prepared to exercise discretion in your favour in light of your conduct and character."

That accordingly was a decision under paragraph 4 of HC 510, which is the general provision relating to all of the specific categories that then follow. The decision letter went on to say:

> "Your case has also been considered under paragraph 21 of HC 510. Permission to establish in business is dependent upon a number of factors, although satisfying the Secretary of State that these formal requirements are met is not conclusive in your favour in accordance with paragraph 4 of HC 510 above. However, your application is refused under paragraph 21 of HC 510 because …"

And it proceeds to state the ground of refusal. Thus the decision letter reflects the interrelationship between paragraph 4 and paragraph 21 of HC 510. There are specific categories, of which paragraph 21 is one, namely for people wanting to establish business, and they have specific paragraphs dealing with them. There is then, though sequentially prior, paragraph 4 as an overall provision which gives discretion to the Secretary of State and is of the nature of saying, "Consider all the circumstances; the satisfaction of formal requirements applying to any particular category is not itself conclusive."

11. In the decision letter, the first ground of refusal under paragraph 4 was: "You have failed to comply with a condition of your previous leave." The stated particular was that, in breach of the prohibition on doing paid or unpaid work, the claimant had been encountered on 20 January 2017 at the barber's shop in question.

> "The IO [immigration officer] states that you were seen to be working on the premises and upon further questioning you confirmed that you had, in fact, been engaged in work activities upon the premises. It is acknowledged that in the interview conducted by the IO that you stated that you did not get paid for the work provided. However, you are limited by any work undertaken, whether paid or unpaid. It is also to be noted as further evidence that the manager of the business premises confirmed that you were on the day of 20 January 2017 engaged in work as stated above. This is in contravention of your limited leave to enter the United Kingdom."

12. The second ground was: "You have sought or obtained leave by deception." It was said in that regard that in his entry clearance application the claimant had answered, in response to one question, that he did not have any friends or family in the United Kingdom, whereas in fact, as his answers to immigration officials show, his uncle was in the UK and, as the further answers from the manager showed, the uncle was actually working at the barber's shop. The claimant explained in interview by the entry clearance officer that he had answered in the negative because he did not think he would get a visa if he had said yes.

13. The third ground, which I have already read and which is by way of conclusion, was: "It would be undesirable to permit you to remain in the United Kingdom in light of your conduct and character."

14. In respect of the paragraph 21 factors, the stated ground was: "The Secretary of State is not satisfied that you will be bringing into the country money of your own to establish in business." The letter stated: "In your business plan, you have declared that a total of £2,500 is needed for the initial investment to start up in business as proposed." It then went on, in a sequence of paragraphs on the second page, to query the evidence that had been put forward so far as the money was concerned. It is acknowledged by the Secretary of State that in one respect there was a mistake in the letter, in that (to cut a long story short) the transfer from the claimant's father was said not to sufficiently tie up on the banking records, whereas in fact it is acknowledged that it did. However, two particular points are set out. First at the beginning of this section:

> "It is acknowledged that you have provided a note signed by a Mr Duzgun Aydoğdu that he has gifted you 16,000 Turkish lira. However, this note does not have an address or a telephone number whereby it can be confirmed that this amount has actually been gifted. Without the ability to corroborate this evidence in support of the gift, little credence can be afforded to it."

Then, on the third page of the letter:

> "Individuals intending to establish in business in the United Kingdom must be able to show that the money they intend to invest is entirely their own, solely under their control, and is capable of being invested into the business on a long-term basis. A gift from friends or family members must be supported by evidence that the lender is financially able to make the gift without the possibility of needing to recall the money. A family loan can form part of your initial funding. However, it cannot be relied on to provide the whole of your business capital."

15. By way of a postscript going to credibility, it was noted that on his entry clearance application form the claimant had stated that his trip would be no longer than three days. It is said that the timing of the application, the fact of the stated intention to visit for three days, the deception of gaining entry into the UK, and the working in breach of conditions:

> "suggest your application is more of an attempt to secure leave rather than reflective of a genuine intention to establish in business. This seriously undermines the credibility of your application and the legitimacy of…"

That, therefore, is the decision letter.

16. A decision letter is required to contain correct directions as to, and application of, the law. It is required to show that the decision-maker has taken account of all relevant factors (the weight to be given to the factors being a matter for the decision-maker) and has not taken into account irrelevant factors. The decision itself must be rational, in the sense of not being one that could not have been reached by a reasonable decision-maker. Decisions must also be read in their entirety, without abstracting one part improperly from its context. Of course, that does not mean that an apparent mistake in one part is to be corrected by reading inappropriately matters that come from another part—if, that is, the other part has no bearing on the apparent mistake and does not serve to provide for it some legitimate context. What it does, however, mean is that one should read a decision letter in a complete and contextual manner, looking both at the general context and the textual context, and that one should read it reasonably and with an element of common sense.

17. The initial ground of challenge here is that the decision-maker fell into error by dealing with paragraph 4 of HC 510 prior to and in isolation from paragraph 21 of HC 510. The particular mischief to which that is said to give rise is the mischief of failing to have regard to all relevant matters, including the matters that are specifically, but not only relevant, to paragraph 21 concerning the business, its genuineness, its viability, and suchlike. It is said that this error was compounded by an unnuanced approach to the paragraph 4 factors themselves (that is, those specific to paragraph 4 rather than to paragraph 21), so that questions of alleged deception in entry into the country and breach of visa conditions and thereby of immigration control have (it is said) been elevated into a determinative nature that, as is well established on the case law, they do not properly possess. The decision-maker has then gone on simply to look at, for example, the breach of immigration control, without going on to consider where that lies in terms of severity and what might be the proper response to it in the light of the other factors, including the business factors and what I might call paragraph 21 factors. In short, it is said that the defendant has adopted an unnuanced approach, simply treating certain matters as conclusive against the application.

18. In my judgment, that is not a fair or proper criticism to make of the decision letter. The decision letter itself is structured in the way that I have indicated by reference, first, to a decision under paragraph 4 and, second, to a decision under paragraph 21. That does not seem to me to be inherently improper. The question of structure is, in and of itself, one more of style than of substance. The important question is not itself the way in which the matter has been set out but, rather, whether the decision-maker, in reaching a decision, had regard to all the factors that should have informed the decision. Mr James, in his lucid submissions for the claimant, indicated at one point that if the decision had been structured the other way round, so that the paragraph 21 decision were first and were followed by the paragraph 4 decision, the first ground of objection would be more difficult to sustain. However, it seems to me that that is to elevate form over substance and that one needs to look at what the decision-maker actually did.

19. I have been referred to the decision of UTJ Grubb in *Temiz, R (on the application of) v Secretary of State for the Home Department (IJR)* [2016] UKUT 0026 (IAC), which in some ways was quite similar to this case but in some ways was materially different. In that case, the finding was that the decision-maker had simply adopted a straightforward and uncritical approach of acting on a finding that there had been overstaying, but failing to take into account a relevant context as one of all the circumstances and, therefore, simply relying on

an assertion of unlawful presence; this approach was regarded as being insufficiently nuanced. I do not in any way disagree with the decision, but it is a decision on the particular case. In that case, the material complaint about the paragraph 21 determination was that the Secretary of State had wrongfully refused to have regard to evidence germane to paragraph 21 because that evidence had been gathered during a period of unlawful overstay. The Secretary of State had wrongly directed herself that it could not therefore be taken into account. Therefore, while I have regard to the decision in *Temiz*, I am not greatly assisted by it.

20. Going back to the structure of the decision letter, one needs to guard against two dangers. On the one hand, one must not read a decision letter in a manner that improperly reads into it grounds of decision that it does not contain. On the other hand, one must read a decision letter synchronically rather than diachronically. I mean at least this much: that the fact that one part of a decision letter follows another part, even a part that has expressed a conclusion, does not mean that the decision-maker only had in mind the bits that come later at the stage when the later bits of the decision were being typed out. The complaint advanced in the present case is that the circumstances relating to the business were only considered in respect of paragraph 21, after the paragraph 4 issue had already been decided. That seems to me an unfair way of reading a decision like this; one is entitled to view the letter as a single event and is not, in my view, entitled to suppose that the decision-maker, when forming the judgment on the earlier part, did not have in mind the factors which are set out clearly later.

21. In the present case, the matters relied on under paragraph 4 are clearly established and, to put it no higher, it was clearly open to the Secretary of State to have regard to them and to act on the basis of them.

22. There was the fact of working in breach of the visa. The observations of the immigration officers and the responses in interview, both of the claimant and of the manager present at the scene, indicated clearly that work was going on in breach of the visa. Even if that work was not paid, in the sense that it did not result in money going into the claimant's pocket, it was real work. (It was said to be work in the course of training, but that does not appear to have any more meaning here than experience in an active business, involving attending to clients.) The defendant was clearly entitled to have regard to that.

23. That the claimant "sought or obtained leave by deception" is clear both from the plainly false answer given in the entry clearance application, as acknowledged later to the entry clearance officer, and in the answers to the immigration officers, which the Secretary of State clearly had in mind though the point is not specifically mentioned. The decision letter said that all the circumstances of the case had been taken into account. As I have said, it seems to me to be an unreasonable way of reading the decision letter to suppose that that did not involve the matter referred to at the end of the letter. The conclusion that the application was more of an attempt to secure leave than reflective of a genuine intention to establish in business, and that that undermined the credibility and legitimacy of the application, should not be isolated from the decision under paragraph 4 as though some sort of afterthought. In these circumstances, it seems to me that it is impossible to conclude that the decision under paragraph 4 was one that the Secretary of State was not entitled to reach.

24. The question of satisfaction under paragraph 21 is, of course, not determinative of a paragraph 4 application. Criticism is made of the Secretary of State dealing with paragraph 21 after paragraph 4. I say two things on that point. First, for reasons I have indicated, it is unreasonable to criticise the Secretary of State as though the factors mentioned

in the context of paragraph 21 have simply been blocked off from the decision-maker's mind. Second, I do not accept the suggestion (which I think was maintained, though I am slightly unclear) that a paragraph 4 decision necessarily requires a decision to be made on the paragraph 21 formal criteria. Take the availability of funding. Of course, the decision-maker under paragraph 4 should have regard to all relevant matters. But if the case is such that the decision-maker is able to say, "It is actually irrelevant whether you fulfil that particular criterion, because even if you do—and assuming without deciding that you do—there are conclusive objections to you entering or remaining", then it is plainly wrong and indeed absurd to suppose that the decision-maker has nevertheless to proceed to reach a conclusion on the disputed matter.

25. This last point touches on part of the paragraph 21 decision. The paragraph 21 decision focused on two aspects. The second one was the credibility problem. The primary focus was on the question of financial resources. I have referred to the relevant part of the business plan. The Secretary of State has a policy which reads in part:

> "You may use discretion if the level of financial investment is small in comparison to the expected profits generated or where gifts from family members have been made. In all cases, you must be satisfied enough evidence has been provided to show the money has been gifted by an individual who is financially able to make the gift without the possibility of needing to recall the money at short notice."

And later:

> "Applicants must show that the majority of funds to be invested are their own. Loans either in the form of a business bank loan or from another source such as a family member may form part of a funding package to set up in business, but they must not be considered as assets belonging to the applicant."

26. In the present case there was evidence of a transfer from a person said to be the claimant's father, and there was a document saying that this was a gift and that, if more funds were required, more funds would be provided. There were two obvious problems with the evidence, both of which were referred to by the Secretary of State. First, the evidence of the money being a gift was really a mere say-so in a document that was uncorroborated and incapable of confirmation; so that little credence could be given to it. Second, as the decision letter says, "A gift from friends or family members must be supported by evidence that the lender is financially able to make the gift without the possibility of needing to recall the money." There simply was not any evidence in that regard. In fact, the evidence, such as it is, shows that the transfer came from an account that contained in sterling terms approximately £1,500 at all material times, save for a transfer in and immediate transfer out in sterling terms of £3,000 that was paid to the claimant. The source of the money is entirely undocumented. (As I have noted, though the decision letter itself does not do so, the transfer of the money both into and out of the account postdated the detention of the claimant.)

27. In these circumstances, the paragraph 21 decision was one that the Secretary of State was perfectly entitled to make. But, if one were to suppose that the decision under paragraph 21 was vitiated because the defendant wrongly supposed that the payment out and the payment in could not be tallied, this would take matters nowhere, because the defendant had regard to the matters referred to specifically under paragraph 4 and to the factors referred to as

undermining credibility under paragraph 21 and was for those reasons unarguably entitled to reach the decision under paragraph 4.

28. For those reasons, the application for judicial review is refused.

End of Judgment

Transcript from a recording by Ubiqus

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