



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/33180/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 20th October 2014**

**Determination
Promulgated
On 15th December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

MR TAYLAN YILDIRIMLAR

and

Appellant

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr B Ali (Solicitor)

For the Respondent: Ms A Holmes (Senior Home Office Presenting Officer)

DECISION AND REASONS ON ERROR OF LAW

1. The appellant's appeal against decisions to refuse to vary his leave to remain and to remove him by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006 was dismissed by First-tier Tribunal Judge Bart-Stewart ("the judge") in a determination promulgated on 11th August 2014. The adverse decisions were made by the Secretary of State following an application for leave to remain in order to continue operating a business under the Turkey-European Community Association Agreement.

2. The appellant's case was that he established a clothing business in March 2012 and secured office premises by means of a tenancy or licence agreement. The Secretary of State found that the appellant had failed to show that either he or his landlord appeared on the lease of the premises and so she was not satisfied that the appellant had any security there. She also found that although the appellant had provided profit and loss accounts, no balance sheet was made available showing that the business had any fixed assets. This cast further doubt on the security of tenure for the business premises. She was not satisfied that the appellant had made any real investment in his business.
3. At the hearing of his appeal, the appellant gave evidence, as did a witness who said that the appellant rented business premises from him. It appeared that the appellant moved to other premises after making his application.
4. The judge found that the appellant's case that he lawfully sub-let premises was not made out. It appeared that the appellant's landlord only had a licence agreement with the superior title holder. So far as business activities were concerned, the judge noted that the appellant referred to a clothing enterprise in his application, whereas his oral evidence suggested a "variety store". Other than bank statements showing payments to and sometimes from the person he rented premises from, the judge found that there was no evidence of other transactions showing the buying of stock or other business items or expenses. She went on to find that the majority of the 300 or more documents in the appellant's bundle post-dated the respondent's decision. Her overall conclusion was that the appellant had not shown that he operated a business or had made any substantial investment.
5. An application was made for permission to appeal. It was contended that the judge erred in several respects. First, she conflated or confused the licence agreement between the superior title holder and the person the appellant rented premises from and the rental agreement between the appellant and his immediate landlord. Secondly, so far as business activity was concerned, the judge failed to take into account payment of rent and similar bills and numerous receipts and invoices relating to the appellant's business activities. This showed, overwhelmingly, that he was in business, as claimed. Thirdly, the judge failed to give reasons for excluding evidence that post-dated the respondent's decision and there was no legal basis for excluding this evidence. Fourthly, the judge erred in finding that the appellant had not invested in his business. This was not material as the Secretary of State had not relied on this ground. Finally, the judge failed to take into account tax and similar documents, which appeared in the bundle.
6. Permission to appeal was granted on 29th August 2014. The judge granting permission found that it was arguable that as the appellant had brought an in-country appeal, section 85(4) of the 2002 Act applied, so

that the judge ought to have considered evidence which post-dated the date of decision, rather than excluding it.

7. In a brief rule 24 response from the Secretary of State, made on 29th September 2014, it was contended that the judge directed herself appropriately and that her conclusions were open to her. There was a lack of adequate evidence that the appellant ran a successful business.

Submissions on Error of Law

8. Mr Ali said, so far as the first ground was concerned, that the witness evidence and rental agreement showed the arrangements. The appellant rented premises from a person who accepted, in due course, that the superior landlord's permission had not been given. In any event, the premises were lawfully licensed and so the appellant had a modest degree of security of tenure in the business premises. Secondly, there was ample evidence in the appellant's bundle showing transactions relating to the premises and the appellant's business activities. The judge erred in paragraph 15 of the determination in finding against the appellant in this context. The relevant evidence was contained at pages 205 to 334 of the appellant's bundle. The items here showed that the appellant purchased stock. Thirdly, even though some of the evidence post-dated the date of decision, this was an in-country appeal and there was no exclusionary rule of evidence. The judge was obliged to consider all of it. The determination showed that she took into account the bank statements but not the other items. Fourthly, a balance sheet was provided which was sufficient evidence of business activities and showed the assets the appellant had. Moreover, the documentary evidence before the judge included items from HMRC, at pages 23 to 78 in the appellant's bundle. These were not taken into account. For example, the document at page 33 showed business premises at London W11 3HG and the appellant trading there as "Naz Fashions". Pages 75 to 78 were receipts from HMRC showing that the appellant was self-employed and paid Class 2 national insurance contributions. Events had moved on and he had now taken other premises, at Camden Lock.
9. Ms Holmes said that, so far as the first ground was concerned, the judge was not confused. It was simply unclear why the arrangements were as they appeared to be.
10. So far as evidence of business activity was concerned, Ms Holmes said that the invoices contained in the appellant's bundle related to Naz Fashions and it was clear that some of them came into being before the date of the adverse decision. For example, at page 215 was an invoice dated 1st November 2012, long before the adverse decisions were made in July 2013. There were many similar items. The Secretary of State accepted that the judge ought to have taken this evidence into account as legally relevant and as bearing on the lawfulness of the Secretary of State's decisions to refuse to vary leave and to remove the appellant. The

Secretary of State accepted that the failure to take this evidence into account amounted to a material error of law.

Conclusion on Error of Law

11. In the light of the submissions from the representatives, and Ms Holmes' acceptance that the judge failed to take into account material evidence, including evidence which bore on the appellant's business activities, I conclude that the decision of the First-Tribunal contains a material error of law and must be set aside and re-made.
12. The evidence not taken into account is substantial and the findings made by the judge are, as a result, limited. In the light of the extent of the fact finding required, I conclude that the appropriate course is to remit the appeal, so that it may be re-made in the First-tier Tribunal, at Taylor House, before a judge other than First-tier Tribunal Judge Bart-Stewart.

DECISION

The decision of the First-tier Tribunal, containing a material error of law, is set aside. It will be re-made in the First-tier Tribunal, at Taylor House, before a judge other than First-tier Tribunal Judge Bart-Stewart.

Short directions are attached.

Signed

Date **20th October 2014**

Deputy Upper Tribunal Judge R C Campbell



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For the Respondent: Ms A Holmes (Senior Home Office Presenting Officer)

DIRECTIONS

The decision of the First-tier Tribunal has been set aside. It will be remade in the First-tier Tribunal, at Taylor House, on the first available date, before a judge other than First-tier Tribunal Judge Bart-Stewart. The following directions will take effect:

1. Two hours will be set aside for the hearing of the appeal.
2. Any further evidence relied upon by the parties shall be filed with the Tribunal and served on the other party no later than ten working days before the hearing date.

Signed

Date **20th October 2014**

Deputy Upper Tribunal Judge R C Campbell