OUTER HOUSE, COURT OF SESSION

[2018] CSOH 87

P871/17

OPINION OF LORD ARTHURSON

In the petition of

JOSEPH ODION OCHIEMHEN (AP)

Petitioner

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Petitioner: Caskie; Drummond Miller LLP
Respondent: McIver; Office of the Advocate General

17 August 2018

Background

[1] In this application for judicial review the petitioner invites the court to quash a decision, dated 12 June 2017, made on behalf of the respondent asserting his liability for removal from the United Kingdom following a curtailment of his leave to remain as a Tier 1 Entrepreneur Migrant, all in the light of certain alleged breaches of conditions related to that status, as contended for on behalf of the respondent.

[2] The petitioner is a citizen of Nigeria. He originally entered the United Kingdom on a student visa. On 11 September 2014 he was granted leave to remain as a Tier 1 Entrepreneur until 11 September 2017. On 13 October 2015 the respondent issued a decision curtailing the

petitioner's leave to remain, and on 22 October 2015 set directions for his removal. Following the raising of proceedings in this court, those decisions were reduced: see *JO* v *Secretary of State for the Home Department* [2016] CSOH 179. On 12 June 2017 a new decision was made and duly promulgated on behalf of the respondent by a way of reconsideration following the said review proceedings, and it is this decision which the petitioner in these current proceedings has invited the court to set aside. Standing that my brother judge, the Honourable Lord Ericht, has devoted 60 paragraphs to matters of fact and law together with full reasoning in respect of his earlier decision regarding the present petitioner, I propose to address the issues arising in this new challenge with relative brevity.

Submissions for the petitioner

[3] Counsel for the petitioner commenced his submissions by looking very broadly at the structure of limits to be placed, by way of curtailment, on entitlement to reside in the United Kingdom, contending that where an immigration officer has reached the view that a person may be in breach of conditions of such an entitlement, four questions properly arose to be asked and answered. These questions could be summarised thus: (i) what are the relevant conditions; (ii) have the conditions been breached; (iii) if the conditions have been breached, should the immigration officer exercise her or his discretion to curtail the entitlement; and, (iv) if the latter exercise of discretion has led to a decision to curtail leave to remain, should the officer then exercise a further discretion to proceed to decide to remove the person. Having regard to the terms of the decision letter of 12 June 2017, counsel submitted that, while the first, second and fourth questions had therein been asked and answered by the respondent's official, the third question had not, and this omission in turn stood in contrast in that regard to the express terms of the earlier decision letter of

13 October 2015, which was of course the subject of the said prior proceedings involving this petitioner.

[4] Counsel submitted that while there are many areas of mandatory refusal within the immigration rules, the decision to be exercised in this case was a discretionary one, and it was not apparent on the face of the decision letter of 12 June 2017 that the author of the letter was even aware that the decision which he was engaged in was discretionary; and, in any event, no reasons had been given by him in respect of any such exercise of discretion in the decision making process. In terms of the relevant Home Office guidance on Curtailment, version 16.0, published on 25 April 2016, at page 62 of 100, it was plain that in cases in which an immigration officer required to consider discretion, the officer must record that consideration and the reasons for any decision on whether to exercise discretion. Further, the decision on whether discretion has been exercised requires to be explained within the decision letter itself, in order that the migrant can see that the officer has considered the circumstances of her or his case.

[5] Counsel for the petitioner further submitted, really in passing, that there had been a significant gap in time between (i) the attendance in October 2015 at the premises of Aberdeen Alarm Company Limited in Aberdeen of the respondent's officials, where the petitioner had been encountered, as set out in detail in the earlier opinion of Lord Ericht in this matter, and (ii) the decision which was the subject of challenge in this case, dated 12 June 2017. The material related to October 2015 could not be said to be recent and so could not accordingly be characterised as fair and proportionate. Counsel referred to the related danger which required to be guarded against in such circumstances where an earlier decision had been made by an official in adverse terms to an applicant, and submitted that in this case the respondent's official, in reaching the June 2017 decision, had largely

concentrated on factors which did not favour the petitioner's claim. Counsel relied in advancing this submission on dicta of Lord Malcolm in *AH* v *Secretary of State for the Home Department* [2011] CSOH 7 at paragraph 33.

[6] Counsel's final and substantive submission on behalf of the petitioner proceeded upon a detailed analysis of the decision letter of 12 June 2017 in the light of the observations of Lord Ericht in *JO,* at paragraphs 43 to 60. It was plain that the factual background involving the company set up by the petitioner, Alphawhale Limited, and its relationship with other companies in respect in particular of the role of the petitioner, was one with certain complexities. In *JO*, at paragraph 51, Lord Ericht put the matter thus:

> "In the current case, it must have been obvious to the respondent that this was not a straight forward case where the worker was working full-time for one employer. He had been working for Aberdeen Alarm Company for a period of only three weeks, from 23 August to 13 September 2015, and that had been on a casual basis. The respondent knew that the petitioner was an entrepreneur and that he conducted his entrepreneurial activities through Alphawhale Ltd. The respondent accepts that when the petitioner was encountered by immigration officers he claimed that he provided a consultancy service and that he only worked part-time."

Counsel submitted, against that background, that there were clear indicators of complexity in the petitioner's case, that one should not just look at all the evidence pointing in one direction, and, further, that particular consideration required to be given to the complex question of whether the petitioner was acting as an employee or hiring out his services through Alphawhale Limited. Counsel submitted that this had not been done in this case. By way of example, in the new decision letter the respondent's official purported to have consulted the Employment Status Index, as desiderated by Lord Ericht at paragraph 52, but no analysis of factors had been given arising from such consultation in the letter. Further, in so far as the decision letter purported to rely on what is referred to therein as admissions made during the petitioner's encounter in October 2015 with the respondent's officials, there

was no actual evidence that the petitioner had said anything such as this at any point. Counsel argued that the respondent had again fallen into error by focussing entirely on the Aberdeen Alarm Company aspect of the petitioner's business. Instead, in reality there was a variety of contracts requiring to be considered which were entrepreneurial and indicative of self-employment in this case. In this case there was, further, no reference by the decision maker to matters of insurance or PAYE deductions. The test of entrepreneurship to be applied was in effect one of self-employment and involved consideration of matters of complexity identified by Lord Ericht in his prior opinion, and that exercise had not been adequately undertaken on this occasion by the respondent's official.

Submissions for the respondent

[7] Counsel for the respondent submitted that this case was not about a distinction between self-employment and employment as such, the said distinction having simply been used as a proxy test by the respondent's official in considering the real issue in the case, which was that of entrepreneurship. Counsel submitted that the test of genuine entrepreneurship was in essence an impressionistic one, to be carried out in the round, and that this status was a flexible one, in respect of which policy guidance could only go so far. The main question to be addressed was whether the respondent's official had properly undertaken and addressed the test of whether the petitioner was an entrepreneur. Counsel's broad submission was that the decision maker had duly done so and that in so doing had reached a decision that he was entitled to reach in all the circumstances.

[8] The relevant policy guidance, counsel observed, could be found in the April 2017 Home Office Policy Guidance document, Tier 1 (Entrepreneur) of the Points Based System –

Policy Guidance, in particular at paragraph A41 at pages 80 – 81 of that document, which provides:

> "**Genuine Entrepreneur Activity (contract of service with another business)**
>
> **A41.** If you are granted leave to enter or remain as Tier 1 (Entrepreneur) migrant, your leave will prohibit you from engaging in employment except where you are working for the business which you have established, joined or taken over. You will comply with this restriction if, for example, you are employed as the director of the business in which you have invested, or if you are working in a genuinely self-employed capacity. In this capacity you will have a contract **for** service.
>
> You may not, however, be considered to be working for your own business if the work you undertake amounts to no more than employment by another business (for example, where your work amounts to no more than the filling of a position or vacancy with, or the hire of your labour to, that business, including where it is undertaken through engagement with a recruitment or employment agency). In this capacity you would have a contract **of** service. This applies even if it is claimed that such work is undertaken on a self-employed basis.
>
> In considering whether your work amounts to genuine self-employment (and is therefore work for the business which you have established, joined or taken over) or is in fact employment by another business, we will take into consideration your status in tax law and employment law, as well as whether:
>
> - you are in business for yourself, are responsible for the success or failure of your business and can make a loss or a profit;
> - you can decide what work you do and when, where or how to do it;
> - you can hire someone else to do the work;
> - you are responsible for fixing any unsatisfactory work in your own time;
> - your client agrees a fixed price for your work – it doesn't depend on how long the job takes to finish;
> - you use your own money to buy business assets, cover running costs, and provide tools and equipment for your work;
> - you can work for more than one client;
> - you put in bids or give quotes to get work;
> - you are under direct supervision when working;
> - you submit invoices for the work you have done;
> - you are responsible for paying your own National Insurance and tax;

- you get holiday or sick pay when you are not working; and whether
- you operate under a contract for services or consultancy agreement that uses terms like 'self-employed', 'consultant' or an 'independent contractor'

We will consider these factors as a whole. You should not assume your work will be classed as genuine self-employment based on a single factor.

If your work amounts to no more than employment by another business, we may consider you to be working in breach of your conditions of stay, and that you are therefore liable to curtailment of your stay and/or removal from the United Kingdom."

[9] Counsel submitted that it was easy to fall into the trap of considering the matters raised in the petition in the context of a division between self-employment and employment, whereas in fact one was at all times searching for genuine entrepreneurial activity; and, in such circumstances, counsel submitted, a person could be self-employed but may still not meet the entrepreneur test. All of the factors listed in A41 required to be considered as a whole in an "in the round" consideration which had here been duly carried out by the respondent's official. Following upon the reduction of the earlier decision letter, the respondent had sought further representations from the petitioner's agents and had received, attached to a letter of 11 April 2017, a variety of bundles of material for consideration. This material had all been considered and the decision letter of 12 June 2017 was reflective of that due consideration. An in the round assessment having been carried out, the conclusion reached in the decision letter to the effect that there was no genuine self-employment, when viewed as a proxy test in respect of the real issue of genuine entrepreneurship activity, disclosed no error of law. Counsel accepted that the issue of liability insurance had been left out of account, but submitted that this was the only matter highlighted in the previous court opinion which had been omitted in the current exercise.

[10] Finally, counsel further accepted that while the earlier decision letter had expressly referred to a discretion based decision process, the word "discretion" did not appear in the 12 June 2017 letter. He referred, however, to the single sentence, "A decision has been made to curtail/ revoke your leave so that it expires with immediate effect". Counsel submitted that this sentence inherently recognised that a decision had been made to curtail leave and that accordingly the third question had been duly asked and answered, the whole reasoning contained within the decision letter being capable of being read across into the discretion based component of the decision making process.

Discussion and decision

[11] The concept and status of entrepreneurship is undoubtedly a difficult one to put into words in the form of a short definition in rules or even in a policy document. Accordingly, the "in the round" assessment to be undertaken on behalf of the respondent in terms of paragraph A41 of the April 2017 Tier 1 (Entrepreneur) Policy Guidance seems to be an eminently sensible approach, in which the factors listed in that paragraph are to be considered as a whole by the decision maker. Nevertheless, as recognised by Lord Ericht in *JO,* at paragraph 49, "The question of whether a worker is employed under a contract of service can be a complex one and turns very much on the circumstances of the particular case." In short, for the reasons outlined by Lord Ericht, when a factual situation such as that regarding the relationship between the petitioner and his company Alphawhale Limited, and the various other bodies referred to in the decision letter and in the material available to this court, discloses a multi-faceted and nuanced position, a decision maker, such as the respondent's official in this case, faces what can only be described as an unenviable task, even in the course of an in the round assessment exercise. In considering matters at this

stage, I agree with counsel for the respondent that there has indeed here been an attempt to carry out an in the round assessment in accordance with paragraph A41 of the April 2017 Policy Guidance, and further that the author of the decision letter of June 2017 has sought to ask and answer the key question in the case, namely whether the petitioner was acting as an entrepreneur in all the circumstances. Notwithstanding that characterisation of the respondent's official's efforts in this regard, I have however concluded that the overall conclusion reached was not one that the official was entitled to come to on behalf of the respondent on the material before him and against the whole extended hinterland of this case.

[12] I have reached this conclusion for the following reasons, which I now set out briefly as follows. In the decision letter, the author, in the only passage referring to the Employment Status Index, notes by way of example that there was no written contract for service in respect of Alphawhale Limited's relationship with Aberdeen Alarm Company. But the fuller picture is in fact that there was no written contract for services, or of service, to be founded upon, and as Lord Ericht found in fact, the petitioner only worked for Aberdeen Alarm Company for a period of three weeks, in August and September 2015, and that on a casual basis. Indeed, the passage in the decision letter relating to the Employment Status Index, deals solely with Alphawhale's relationship with the Aberdeen Alarm Company. With regard to the material concerning Fraoch Scotland Limited, once more this, as I understand the position, is a background matter which was previously at large before Lord Ericht. The admissions referred to in the decision letter, concerning the encounter in October 2015 at the premises of Aberdeen Alarm Company between the respondent's officials and the petitioner, were not accepted by counsel for the petitioner, and counsel for the respondent did not seek to produce any independent document establishing the terms or

tenor of such alleged admissions. Finally, counsel for the respondent accepted that the decision maker had omitted any reference to liability insurance, as had been desiderated by Lord Ericht in the earlier process. In these circumstances, I am not satisfied that a full and balanced in the round assessment has been carried out by the author of the decision letter, notwithstanding an earnest attempt to do so. The decision maker has embarked upon an in the round decision making exercise in terms of the guidance set out in paragraph A41 of the Policy Guidance which is essentially incomplete and in which the final decision is not supported by the sort of comprehensive and adequate reasoning which must be required even in such a multifactorial and broad assessment process.

[13] Finally, what is plain from the terms of the letter itself, in the light of the submissions of counsel, is that there is nothing in the terms of what is, on any view, a detailed decision letter, pertaining to what counsel for the petitioner referred to as the third question concerning the exercise of discretion in respect of a decision to curtail leave to remain. The mere statement that a decision has been made to curtail leave cannot be adequate for such purposes, notwithstanding the contentions of counsel for the respondent on this matter. It is not just the lack of express reference to the word "discretion" nor of any narrative as to reasoning in that regard which renders the decision letter flawed, in my view. While the sentence founded on by counsel for the respondent regarding the fact of a curtailment decision having been made could perhaps contain a silent and unexpressed reference to discretion having been considered and exercised, there is nothing in the letter whatsoever, by way of assertion, let alone narrative, in respect of any explanation of the decision by the respondent's official on whether or not, and of course, how, discretion was exercised. This explanation is not just a question of form, but is an important part of the process, because any person whose leave is curtailed by such a decision must be able to see that the

circumstances of their particular case were at large in the mind of the decision maker within this chapter of the fuller decision making process. In considering the terms of the letter as a whole including the sentence founded on by counsel for the respondent, I have concluded that nothing marks out this decision letter as one in which the author thereof even knew that he had any discretion to exercise in the course of the curtailment decision; and, further and in any event, given the terms of the decision itself, in which liability for removal has been established, it is wholly unclear from within the four walls of the decision letter what the basis is or could be for any decision by the author to refuse to exercise his discretion in the petitioner's favour.

Disposal

[14] In the whole circumstances, and for these reasons, I propose to sustain the petitioner's plea-in-law, repel the respondent's pleas-in-law and pronounce decree of reduction in respect of the decision made on behalf of the respondent dated 12 June 2017. I shall reserve meantime all questions of expenses.