



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: VA/34254/2012

THE IMMIGRATION ACTS

Heard at Field House
On 17 June 2013

Determination Promulgated
On 21 August 2013

Before

UPPER TRIBUNAL JUDGE STOREY

Between

MISS SOFIA HASSANI SHEMAGHADA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: None

For the Respondent: Mr E Tufan, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Tanzania. On 26 March 2013 First-tier Tribunal Judge Chambers dismissed her appeal against a decision made by the respondent on 6 September 2012 refusing to grant her entry clearance as a domestic worker in a private household under paragraph 159A of the Immigration Rules which as from 6 April 2012 stated:

“Domestic Workers in Private Households

Requirements for leave to enter as a domestic worker in a private household

- 159A. The requirements to be met by a person seeking leave to enter the United Kingdom as a domestic worker in a private household are that the applicant:
- (i) is aged 18-65 inclusive; and
 - (ii) has been employed as a domestic worker for one year or more immediately prior to the application for entry clearance under the same roof as the employer or in a household that the employer uses for himself on a regular basis and where evidence ... is produced to demonstrate the connection between employer and employee [in the form of;
 - (a) a letter from the employer confirming that the domestic worker has been employed by them in that capacity for the twelve months immediately prior to the date of application; and
 - (b) one of the following documents covering the same period of employment as that in (a):
 - (i) pay slips or bank statements showing payment of salary;
 - (ii) confirmation of tax paid;
 - (iii) confirmation of health insurance paid;
 - (iv) contract of employment;
 - (v) work visa, residence permit or equivalent passport endorsement for the country in which the domestic worker has been employed by that employer; or
 - (vi) visas or equivalent passport endorsement to confirm that the domestic worker has travelled with the employer]; and
 - (iii) intends to work for the employer whilst the employer is in the United Kingdom and intends to travel in the company of either;
 - (a) a British or EEA national employer, or that employer’s British or EEA national spouse, civil partner or child, where the employer’s usual place of residence is outside the UK and where the employer does not intend to remain in the UK beyond six months; or
 - (b) a British or EEA national employer’s foreign national spouse, civil partner or child where the employer does not intend to remain in the UK beyond six months; or

- (c) a foreign national employer or the employer's spouse, civil partner or child where the employer is seeking or has been granted entry clearance or leave to enter under Part 2 of these Rules; and
- (iv) intends to leave the UK at the end of six months in the United Kingdom or at the same time as the employer, whichever is the earlier; and
- (v) has agreed in writing terms and conditions of employment in the UK with the employer, ... including specifically that the applicant will be paid in accordance with the National Minimum Wage Act 1998 and any Regulations made under it, and provides [evidence of this in the form set out in Appendix 7] this {sic} with the entry clearance application; and
- (vi) will not take employment other than within the terms of this paragraph to work full time as a domestic worker for the employer in a household that the employer intends to live in; and
- (vii) can maintain and accommodate him or herself adequately without recourse to public funds; and
- (viii) holds a valid entry clearance for entry in this capacity."

2. The form set out in Appendix 7 (to which para 159A(v) refers) is as follows:

Appendix 7 - Statement of Written Terms and Conditions of employment required in paragraphs 159A(v), 159D(iv) and 159EA(iii)

Statement of the terms and conditions of employment of an overseas domestic worker in a private household in the United Kingdom

This form must be completed and signed by the employer, signed by the overseas domestic worker and submitted with the entry clearance application or with the leave to remain application as required by paragraphs 159A(v), 159D(iv) and 159EA(iii) of the Immigration Rules.

Please complete this form in capitals

Name of employee:

Name of employer:

1. Job Title:

2. Duties/Responsibilities:

3. Date of start of employment in the UK:

4. Employer's address in the UK:

5. Employee's address in the UK (if different from 4 please explain):

6. Employee's place of work in the UK (if different from 4 please explain):

7. Rate of Pay per week/month:

Note: By signing this document, the employer is declaring that the employee will be paid in accordance with the National Minimum Wage Act 1998 and any Regulations made under it for the duration of the employment.

8. Hours of work per day/week:

Free periods per day:

Free periods per week:

9. Details of sleeping accommodation:

10. Details of Holiday entitlement:

11. Ending the employment:

Employee must give weeks notice if he/she decides to leave his/her job.

Employee is entitled to weeks notice if the employer decides to dismiss him/her.

Employee is employed on a fixed-term contract until (date) [if applicable].

Signed Date (Employer)

I confirm that the above reflects my conditions of employment:

Signed Date (Employee) "

3. In refusing her application the respondent counted against the appellant that when she had been granted entry clearance as a domestic worker for the same employer on a previous occasion (in August 2011) she had said in her application form she intended only a four week stay whereas in fact she stayed nine and a half months.

4. The judge dismissed the appeal on three grounds:

- (1) that the appellant could not meet the requirements of paragraph 159A(iii)(b) (the 6 months time limit);
- (2) that she could not meet the requirements of paragraph 159(v) (the minimum wage requirement); and
- (3) that the appellant had failed to show she had the requisite intention under paragraph 159A(iv) (the requisite intention requirement).

5. At the hearing before me there was no appearance by or on behalf of the appellant and there was no explanation for that. In such circumstances I decided to exercise my discretion to proceed to determine the appeal in the absence of one of the parties. As regards (1), Mr Tufan correctly points out that the judge's reasoning was defective because he erroneously considered that the appellant's last visit to the UK as a domestic worker was in breach of the time limit imposed by paragraph 159A(iii)(b). Since the appellant's

last entry clearance was issued in August 2011, when this Rule did not contain any time limit, that was a plain error.

6. As regards (2), the minimum wage requirement at para 159A(v), it seems to me that the FtT judge also erred in that he appeared to consider that this provision required the decision-maker to be satisfied that the appellant would be likely to be paid the minimum wage when she was in the UK. However its wording is confined to a requirement to produce evidence to show a signed written agreement has been reached covering, inter alia, payment of a minimum wage.

7. As regards (3) the requisite intention requirement at paragraph 159A(iv), Mr Tufan submitted that the judge had been correct nevertheless to consider that the appellant had failed to show she would stay for only six months because last time she had stayed eight months longer than she had said she would. The difficulty with this submission is that in paras 10-11 the only reason given by the judge for rejecting the appellant's explanation for her longer stay (that she had intended a shorter trip but her employers changed their plans) was that "it is the action of the employer, controlling conditions of work, times of travel and rates of pay that place a domestic worker within or without the ambit of the relevant Immigration Rule". That wrongly suggests that it is the intention of the employer that is in issue, whereas the relevant rule is concerned only with the intention of the appellant. The appellant's explanation was of potential relevance and could not be dismissed out of hand for the reason given.

8. In light of the above I consider therefore that the judge erred in law and that his decision must be set aside.

Remaking the Decision

9. I do not consider that the appellant can succeed in her appeal because, although the judge's reasoning on para 159(v) was erroneous, the evidence fails to show that the appellant met the requirements of that paragraph which was in force at the date of decision. Whilst the FtT judge misunderstood its ambit, it is clear that the appellant had not produced evidence to show she had agreed in writing terms and conditions of employment in the UK in the form set out in Appendix 7, which was a requirement of a Rules in force on the date of decision (6 September 2012).

10. For the above reasons:

The FtT Judge erred in law and his decision is set aside.

The decision I remake is to dismiss the appellant's appeal.

Signed

Date

Upper Tribunal Judge Storey