IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/10038/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Oral determination given following hearing	
On 11 May 2015	**On 4 June 2015**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JIT BAHADUR BK
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr E Tufan, Home Office Presenting Officer
For the Respondent: Mr R Sharma, Counsel instructed by Charles Simmons Immigration Solicitors

DECISION AND REASONS

1. This is the Secretary of State's appeal against a decision made by First-tier Tribunal Judge Ruth in a determination dated 30 September 2014 and promulgated on 3 October 2014 following a hearing at Taylor House on 24 September 2014. For ease of reference I shall throughout this determination refer to the Secretary of State who was the original

respondent as "the Secretary of State" and to Mr Bk who was the original appellant as "the claimant".

2. The claimant is a citizen of Nepal who was born on 20 January 1979. He had for a number of years apparently been a domestic worker employed by Mr Amit Sangar who is a British citizen and he worked for Mr Sangar both in this country and outside. It appears that he had previously entered the UK as a domestic worker in October 2011 and that his leave on that occasion had been valid until October 2012. However, he left the UK to travel to India with his employers during their holiday and before re-entering the UK which he did on 22 June 2013 he had first had to apply for entry clearance in order to do so. He applied under the new Rules regarding the employ of domestic workers which had been brought in on 6 April 2012. Before the expiry of that leave the claimant made an application for further leave to remain as a domestic worker but this application was refused by the Secretary of State in a letter dated 7 April 2014. It is clear from the refusal letter that the Secretary of State considered the application under the Rules which now applied and not under the Rules which had been applicable at the time when the claimant had first entered the country in 2011. However, as I have already noted, when the claimant had returned to this country in 2013 he had applied for entry clearance under the new Rules. In the refusal letter it is stated as follows:

> "In view of the fact that you entered the UK on 22 June 2013 as a domestic worker in a private household the Secretary of State is not satisfied that you intend 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. Furthermore, as you have already been in the United Kingdom for a period in excess of six months the Secretary of State is not satisfied that a grant of leave would not result in you remaining in the UK beyond the maximum period permitted under this route. Therefore you do not meet the requirements under paragraph 159E.
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> In view of the fact that you have applied for an extension of leave and as your application has not been withdrawn, the Secretary of State is not satisfied that you intend to leave the United Kingdom at the end of six months in the United Kingdom or at the same time as the employer, whichever is the earliest. You do not qualify for leave by virtue of paragraph 159D(vi) with reference to 159A(iv) of the Immigration Rules"

3. The claimant appealed against this decision and the basis of his appeal was that he was entitled to have his application considered under the Rules as they had been when he had first been granted entry clearance in 2011. That would seem to be a difficult argument to advance because there had been a break in his residence in this country and indeed in his entry clearance and when he returned in June 2013 he did so having been granted entry clearance under the new Rules. A positive case is not advanced on behalf of the claimant that under the new Rules (which do not permit a grant of leave where this would result in an applicant remaining in this country for more than six months), he would have been entitled to permission to remain under the Rules.

4. There is some disagreement as to exactly what happened at the hearing before Judge Ruth. It was originally argued in the grounds that on behalf of the Secretary of State a "concession" had been made effectively that the old Rules were applicable and that because of this the only issue which needed to be determined was whether or not the claimant had been in the continuous employ of Mr Sangar, but it is apparent, having had regard to both the witness statement which has been prepared by Counsel who represented the claimant before the First-tier Tribunal and also the note of the Home Office Presenting Officer at that hearing, that no formal "concession" appears to have been made. Indeed the claimant's Counsel has very appropriately accepted that no such "concession" was overtly made. However, it is argued that effectively the point was conceded and certainly today before me Mr Sharma has argued that the difference between whether or not a "concession" was formally made or whether the issue was narrowed is merely a question of semantics. His argument essentially is that at that hearing the Secretary of State through her Presenting Officer effectively agreed that the only issue to be determined was whether or not the claimant had been continuously employed by Mr Sangar which it is now accepted he was and that in light of that it is not now open to the Secretary of State to resile from what was either conceded or at the very least accepted at that hearing.

5. I have been shown a number of authorities, some more recent than others, relating to the effect of a concession by one of the parties, but in my judgment they are all beside the point because it is clear both from the evidence presented by the respective representatives and also from Judge Ruth's note that at the hearing the Secretary of State's representative had relied upon the reasons given in the refusal letter. Accordingly, the issue as to whether or not the claimant could succeed under the Rules was placed fully before the Tribunal and needed to be determined. It may be that the case was not argued as precisely as it might have been on behalf of the Secretary of State and the judge notes in his Record of Proceedings that the Secretary of State's representative had to be given a copy of the judge's papers because he had not been properly instructed before the hearing, but it is nonetheless clear that it remained the Secretary of State's case that under the Rules the claimant could not succeed. Mr Sharma has not sought to persuade me during the hearing that in any event the claimant should have been entitled to succeed on the basis that it would have been sufficient under the Rules if he could establish simply that he had been continuously employed by Mr Sangar, his British citizen employer, although he does not make any concession at this stage that he could not. However, under the Rules as they now are, whatever might have been thought to be the main issue when this appeal was heard before Judge Ruth, the judge needed to consider whether, given that the claimant would if his appeal succeeded have been permitted to remain in the UK for over six months, this could possibly be permitted under the Rules. Having considered the Rules which are applicable now, it would seem that the reasons given in the refusal letter are difficult to challenge. Notwithstanding this, the judge proceeded on the basis that the only issue

really which he had to consider was whether or not the claimant was still employed as a domestic worker as he claimed. He says as follows at paragraph 10 of his determination:

> "10. For the respondent [Secretary of State] the position was clarified. [The Presenting Officer] informed me that as far as he was concerned the issue in dispute was whether or not the [claimant] was still employed as a domestic worker as he claimed."

6. Then at paragraph 19 he says this:

> "19. At the beginning of the hearing the issues in dispute in this appeal were clarified by the [Secretary of State] and this has rather altered the position. The only disputed point, based on those preliminary submissions, is whether or not the [claimant] continues in the employment of his sponsoring family.
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> 20. Given my credibility findings, I have no doubt that he does continue in the employment of the family, has been employed by them since 2007 and is likely to be employed by them for the next several years.
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> 21. I therefore allow the appeal under the immigration rules.
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> 22. No other matters were in dispute in this appeal."

7. The judge then gave his decision allowing the appeal "under the Immigration Rules".

8. In the course of these proceedings the judge was asked to supply his Record of Proceedings and (as I have noted above) he has recorded the Presenting Officer as relying on the refusal letter. In these circumstances the statement made by the judge that "the only disputed point ... is whether or not the appellant continues in the employment of his sponsoring family" (see paragraph 19 of the determination) without further explanation, misunderstands the basis on which the application was refused, because it is quite clear from the refusal letter that the application was refused because the respondent considered that the claimant did not satisfy the requirements under the Rules as they are now.

9. Mr Sharma has attempted to persuade this Tribunal that even if that is right this error is not material because the judge would have been entitled to allow the appeal outside the Immigration Rules on the basis that it was arguable that the Secretary of State through her representative was not seeking to rely on the Rules to their full extent. I do not consider for present purposes that this is a tenable proposition. Without explaining how it was that notwithstanding the Secretary of State's reliance on the refusal letter, the only issue was whether or not the claimant had been employed by the same family even though it would seem that if he were allowed to remain he would be here more than six months, at the very least the decision is inadequately reasoned. Accordingly there is an error of law within the determination such that the decision must be set aside and re-made.

10. Previously this appeal had been listed before Upper Tribunal Judge Gill but because of lack of Tribunal time the hearing could not proceed on that occasion but Judge Gill gave directions that this hearing would "be confined to whether the determination of the First-tier Tribunal should be set aside for legal error". There will therefore have to be a further hearing at which the claimant will be able to advance such arguments as he is advised to do and these will include such Article 8 argument as he is advised to advance, because as again is clear from Judge Ruth's note, it had been submitted on behalf of the applicant that he should be allowed to remain under Article 8 even if he could not succeed under the Rules and this submission was not dealt with in the determination. Having had regard to paragraph 7 of the Practice Statements of the President I consider that in this case the appropriate course would be to remit this appeal to the First-tier Tribunal because the nature and extent of judicial fact-finding which is necessary in order for the appeal to be re-made is such that having regard to the overriding objective in Rule 2, it is appropriate to do so. Also that part of the claimant's case which was founded on Article 8 was not considered by the First-tier Tribunal and that must now be done.

Decision

I set aside the determination of the First-tier Tribunal as containing a material error of law and direct that the appeal be remitted to the First-tier Tribunal sitting at Taylor House to be determined by any judge other than Judge Ruth.

Signed:

Upper Tribunal Judge Craig Date: 20 May 2015