Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: IA/31717/2014**

THE IMMIGRATION ACTS

Heard at Field House, London	**Determination Promulgated**
On 10 February 2015	**On 17 March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

RASHIDAT OLADUNNI RAJI OSENI

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms C Hulse instructed by A & A Solicitors
For the Respondents: Ms A Holmes, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, a national of Nigeria, appealed to the First-tier Tribunal against the decision of the Secretary of State of 25 July 2014 to refuse to grant her application for leave to remain in the UK as a domestic worker and to remove her from the UK. First-tier Tribunal Judge Birrell dismissed the appeal and the appellant now appeals with permission to this Tribunal.
2. The background to this appeal is that the appellant entered the UK on 8 October 2010 as a Domestic Worker in a private household. Her leave to remain was extended on 23 July 2013 until 23 July 2014. According to her witness statement the appellant changed employer on 1 August 2013. She applied for a further extension of her leave to remain on 23 June 2014. The relevant paragraph of the Rules for the purposes of this appeal is paragraph 159EA which provides;

"159EA. The requirements for an extension of stay as a domestic worker in a private household for applicants who entered the United Kingdom under Rules in place before 6 April 2012 are that the applicant:

(i) last entered the UK with a valid entry clearance as a domestic worker in a private household under Rules in place before 6 April 2012; and

(ii) has continued to be employed for the duration of leave granted as a domestic worker in a private household; and

(iii) continues to be required for employment for the period of the extension sought as a full time domestic worker in a private household under the same roof as the employer or in the same household that the employer has lived in and where evidence of this in the form of written terms and conditions of employment in the UK as set out in Appendix 7 and evidence that the employer resides in the UK; and

(iv) does not intend to take employment except as a full time domestic worker in the private household referred to in sub-paragraph 159EA (iii); and

(v) meets the requirements of paragraph 159A (i) and (vii); and

(vi) must not be in the UK in breach of immigration laws except that any period of overstaying for a period of 28 days or less will be disregarded."

3. The respondent refused the application under paragraph 159EA (iv) because the appellant's contract of employment states that she is employed to work for 3.5 hours per day which amounts to 17.5 hours per week and is therefore part-time employment.

4. The First-tier Tribunal Judge heard oral evidence from the appellant and from her employer. The appellant's evidence was that she works for 7.5 hours a day and does additional work on Saturday and Sunday as required and that the salary in the contract of £85 per week is correct. The appellant's employer gave evidence to the same effect and said that the 3.5 hours on the contract was an error as she was under a lot of stress at the time she completed it. She too confirmed that the appellant is paid £85 per week. The First-tier Tribunal Judge also considered a letter from the employer to the Home Office dated 20 June 2014, submitted with the application to demonstrate compliance with Appendix 7 of the Immigration Rules, which confirmed that the appellant is being paid in accordance with the National Minimum Wage (NMW) Act 1988.

5. The First-tier Tribunal Judge concluded that paragraph 159EA required that the domestic worker is employed full-time and that she is paid the NMW. She went on to find that the she accepted the appellant's oral evidence that she works full-time for £85 per week which equates to an hourly rate of £2.20 per hour which is less that the NMW of £6.50 per hour. The Judge rejected the submission that the appellant was treated as a family member and was therefore exempt from payment of the NMW because Appendix 7 specifically requires the payment of the NMW and the employer had confirmed that this was the case. The Judge concluded that the appellant could not therefore meet the requirements of paragraph 159EA.

6. At the outset of the hearing before me Ms Hulse sought to argue that there had been some unfairness in the conduct of the hearing in the First-tier Tribunal and that she had a witness statement prepared by the representatives who appeared in the First-tier Tribunal. However no such allegation was made in the grounds of appeal and no notice

was given of any intention to amend the grounds or as to the evidence to be relied on to support the allegation of unfairness in accordance with the Tribunal Procedure (Upper Tribunal) Immigration Rules 2008. The procedures outlined by the Tribunal in BW (witness statements by advocates) Afghanistan [2014] UKUT 00568 (IAC) were not followed by the appellant in this case. Accordingly I refused to permit the amendment of the grounds of appeal to include any allegation of unfairness.

Error of Law

7. The grounds of appeal to the Upper Tribunal contend that the First-tier Tribunal Judge erred in two respects. It is firstly contended that the First-tier Tribunal Judge's decision was procedurally unfair in that she dismissed the appeal on the basis that the appellant did not meet the requirement to be paid the minimum wage when this issue was not raised in the Reasons for Refusal letter. It is established law that the appellant can only win an appeal by meeting all the requirements of the Immigration Rules whether or not they have been specified in the Reasons for Refusal letter (Kwok On Tong [1981] Imm AR 214). Paragraph 159EA (iii) refers to the terms and conditions set out in Appendix 7. Appendix 7 sets out that in signing the statement of terms and conditions of employment set out in the Appendix *'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.'* The employer in this case did so declare in the letter to the respondent in June 2014.

8. It is contended in the grounds of appeal that the issue of compliance with the NMW requirements was not raised at the hearing in the First-tier Tribunal Judge. However this conflicts with paragraph 4 of the grounds of appeal where it is stated that the First-tier Tribunal Judge raised the issue of compliance with the NMW at the hearing. It is clear from reading the determination that the issue of the NMW was very much in issue at the hearing. Paragraph 25 records that the appellant's representative submitted that as the appellant was treated as a family member the NMW did not apply.

9. Accordingly I do not accept that the Judge made a procedural error in considering whether the appellant was being paid the NMW.

10. The grounds of appeal further contend that the First-tier Tribunal Judge erred in failing to place sufficient weight on the evidence before her that the appellant was exempt from the NMW criteria because she lives with her employer and is treated as a family member. Reliance is placed on the UKBA Immigration Directorate Instruction Guidance on Domestic Workers in Private Households (IDIs) which states that domestic workers shall be paid the NMW unless an exemption applies. The grounds of appeal assert that the IDIs were before the First-tier Tribunal Judge. However at the hearing before me Ms Hulse said that she had been under the impression that the IDIs were before the First-tier Tribunal Judge but she now accepted that they had not. In fact the First-tier Tribunal appellant's bundle contains a print out from Gov.UK in relation to the minimum wage but no IDIs. The grounds of appeal are therefore misleading.

11. Ms Hulse submitted that the Judge should have considered the IDIs even thought they were not before her. I do not accept this submission. The Judge could only make the decision on the basis of the evidence before her. On the evidence before her the Judge

was entitled to conclude that the appellant could not be exempt from the NMW when the provision she applied under specifically required that she is paid the NMW [32].

12. Even if the Judge had the IDIs I do not accept that the extract set out in the grounds meant that the appellant should have been considered as exempt from the NMW. The extract indicates that a domestic worker may be exempt from the NMW if they are treated as a member of the employer's family including sharing in the tasks and leisure activities of the family and having meals and accommodation provided free and as if they were a member of the employer's family. In this case however the Judge found that the appellant naively and misguidedly believed that the employer had treated her fairly when in fact her employer had exploited her trust [31]. The Judge was clearly aware of the evidence put forward by the appellant and her employer as to their relationship. Given her finding at paragraph 31 it is difficult to see how the Judge could have concluded on the evidence before her that the appellant, who worked for her employer full time and undertook extra work at the weekends including babysitting, was being treated as a member of her employer's family.

13. The findings made by the First-tier Tribunal Judge were open to her on the evidence before her and I am therefore satisfied that the decision of the First-tier Tribunal Judge does not contain a material error of law.

Conclusion:

The making of the decision of the First-tier Tribunal did not involve the making of an error on point of law.

The decision of the First-tier Tribunal shall stand.

Signed Date: 16 March 2015

A Grimes
Deputy Judge of the Upper Tribunal