IAC-AH-LEM-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/03493/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 April 2016	**On 9th May 2016**

Before

UPPER TRIBUNAL JUDGE WARR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ABDELMUTI MOH'D ABDEL MUTI AL-TIRAWI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr M Cogan instructed by Farani Javid Taylor, Solicitors
For the Respondent: Mr C Avery, Home Office Presenting Officer

DECISION AND REASONS

1. This is the appeal of the Secretary of State but I will refer to the original appellant, a citizen of Jordan born on 12 April 1978, as the appellant herein.

2. The appellant arrived in this country in July 2006 as a student and was granted further extensions of leave until 13 March 2012 on the same basis. On 4 July 2012 he was given leave to remain until 4 July 2014 as a Tier 1 (Post-Study Work) Migrant, subject to certain conditions. On 5 August 2014 he made an application for further leave to remain which was refused. However on 6 October 2014 he was granted leave to remain until 20 December 2014 as a Tier 2 (General) Migrant, subject to conditions.

3. The appellant applied on 20 December 2014 for further leave to remain as a Tier 2 (General) Migrant but this application was refused on 12 January 2015. The appellant appealed and his appeal came before a First-tier Judge on 23 July 2015.

4. The judge summarises the Secretary of State's decision in paragraphs 3 to 5 of her decision as follows:

> "3. The reasons for the Secretary of State's decision are given in a letter dated 12 January 2015 and is to the effect that the appellant could not be awarded the 20 points for appropriate salary under Appendix A of the Rules for Tier 2 General applicants, but he was awarded the 10 points required under Appendix B for English language and a further 10 points under Appendix C (Maintenance (Funds)).
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> 4. The Secretary of State notes that the salary included on the appellant's Certificate of Sponsorship was not at or above the appropriate rate for the job, as specified under Appendix A of the Immigration Rules and Codes of Practice (which are also specified under Appendix J of the Immigration Rules). It is noted that the appellant's Certificate of Sponsorship, states that his prospective employment most closely corresponds to occupation code 3416 on the Codes of Practice (which are also specified under Appendix J of the Immigration Rules).
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> 5. From 6 April 2013, a new policy on rates of pay for "new entrants" and "experienced workers within the Codes of Practice was introduced". The minimum acceptable rate of pay for a 39 hour working week for the appellant's prospective employment is £25,600 per annum, as stated on occupation code under the experienced worker appropriate salary rate. The Secretary of State notes that the appellant's Certificate of Sponsorship states that his salary would be £21,500 per annum for a 40 hour week, which equates to £20,962 per annum for a 39 hour week. As his prospective salary is not at or above the minimum rate as specified in the Codes of Practice (SOC 2010) under the experienced worker level and the appellant does not meet any exemptions as specified in Appendix A of the Immigration Rules, the Secretary of State did not consider it to be at the appropriate rate for the job. The appellant was therefore not awarded points for appropriate salary and therefore the Secretary of State could not

be satisfied that the appellant met the requirements to be awarded a minimum of 50 points, under Appendix A of the Immigration Rules."

5. At the appeal hearing before the First-tier Tribunal the appellant was represented by Mr Kannangara. There was no Presenting Officer on behalf of the Secretary of State. The judge summarises the evidence and the submissions and her conclusions as follows:

> "13. The appellant states that the assessment by the Secretary of State in respect of his pay is irrelevant, as at the time he was a new entrant and earned the requisite amount. His Tier 2 Migrant visa was for only three months and he can therefore not be labelled as an experienced worker. The appellant states that he no longer works for the aforementioned company and so his circumstances have changed. He has secured new employment at the British Muslim TV network, who have informed him that they will sponsor him under SOC code 3416 and that his salary will be £30,500. The appellant states that all he has worked for in his life is building up to this position and that due to his unstable immigration status, he has not been able to work, despite securing his position already. He is heavily anticipating beginning his role and has been robbed of the chance to begin working as soon as possible, because of the decisions of the Secretary of State.
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> 14. The appellant states that this role he has been preparing for all his life and that he has done the requisite academic training and practical training for the role. In preparation he has a Masters degree in film making from Kingston University, so that he is suitably qualified to be able to handle all the duties required. He already has real work experience in his field, following his time at the Islam Channel network and is sure that he will be able to transfer all his skills to his new role, so that he is best equipped to perform at a high standard.
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> 15. The appellant states that he has made great strides recently, both professionally and personally. He recently married a British national, Victoria Ann Joyce, on 19 November 2014. They have been living together since April 2015. They first met in August 2014 and their relationship blossomed and they became very close. Shortly after, he proposed to her as he believes she is the one for him and he has ensured that he would be able to provide for her. The two of them see children in their future and cannot wait until they reach this stage of their lives. The thought of having to be separated due to a mere formality, is simply heartbreaking. They have many hopes for the future. If the appellant was forced to move back to Jordan, he does not know what he will do.
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> 16. The appellant states that he and his partner will be marrying in November 2015 following their Islamic marriage on 19 April 2014. he believes it

would be a contravention of the sanctity of marriage, if he were to be forced out before they are officially recognised under British law as man and wife, as this would have deep personal ramifications on their lives; but they will carry on despite the insurmountable obstacles in play. In these circumstances he requests that his appeal be allowed. Further in evidence the appellant explained that he was granted Tier 2 leave in 2014 for two months, giving him time to make his last application.

17. Mr Kannangara addressed me and explained that the appellant had a post study work visa and made an application before his leave expired, which was refused. A fresh application however granted him a Tier 2 visa from 6 October to 20 December 2014 and before that leave expired, he was given what he needed by the same employer to apply to continue. His annual gross salary of £21,500 for a 40 hour a week contract was calculated by the Home Office as a 39 hour a week contract at a salary of £20,962. Mr Kannangara referred the Tribunal to E2 and E3 of the respondent's bundle and asked the Tribunal to note page 7 to 9 regarding the code and the salary rates. For new entrants the salary rate is £20,800 and for the experienced £25,600. The appellant states that he has been categorised as a new entrant and if so, then his salary was within the requirements, as for his 39 hour week he was paid £20,962 per annum whereas the required level is £20,800. He submitted therefore that the Secretary of State's approach was wrong, as the appellant was here as a post study worker, became a Tier 2 migrant and was given only three months therefore as a new entrant, should have been considered as such and given the appropriate 20 points under Appendix A for his salary.

18. After the refusal the appellant left that particular employment and secured new employment, but as he is under 3C leave, he cannot make a new application whilst this appeal is pending.

19. Mr Kannangara asked the Tribunal to accept that the appellant should have been viewed as a new entrant, as at the date of decision he was with his old employer. Documents in respect of the new employment is in the appellant's bundle, from which it can be seen that he has a 39 hour a week contract and a gross annual salary of £30,500, which is well above the required rate. In his submission the appeal can be allowed and remitted back to the Home Office. As at the date of decision the Home Office can grant him 60 days in order to make the application. It can be sent back to the Home Office on the basis that the decision is not in accordance with the law, which means his application is outstanding and he can vary the application to the Home Office using the new COS.

The Law

20. This appeal falls to be determined in accordance with the Immigration Rules for Tier 2 General applicants under paragraph 245HD of the Immigration Rules and under Appendix A with reference to Appendix J. The burden of proof is on the appellant and the standard of proof is on a balance of probabilities.

Findings and Conclusions

21. I had the opportunity of hearing and observing the appellant give evidence which he did in a straightforward and helpful manner and I have no reason to disbelieve anything he told the Tribunal and find him credible.

22. Mr Kannangara explained the position very clearly and I agree with his submissions and in all the circumstances, remit this matter back to the Secretary of State, on the basis that the decision is not in accordance with the law. There is therefore an application outstanding which the appellant can vary using his new COS".

6. The judge accordingly allowed the appeal on the basis that the Secretary of State's decision was not in accordance with the law and the matter was remitted back to the Secretary of State.

7. The Secretary of State applied for permission to appeal on the basis that the judge had given no reasons for coming to her conclusion and insofar as she adopted the reasons given by Counsel these were affected by a material error of law. The Secretary of State set out the relevant parts of paragraph 245HD of HC 395 which set out the requirements for leave to remain as a Tier 2 (General) Migrant. The salary level for a new entrant was £20,800 and £25,000 for an experienced worker. The Secretary of State set out in bold subparagraph (d) which reads as follows:

"(d) Where both "new entrant" and "experienced worker" rates are stated in Tables 1 to 5, the "new entrant" rate will only apply if the applicant:

i. is applying as a Tier 2 (General) Migrant and scores points from the Post-Study Work provisions of Appendix A,

ii. is applying as a Tier 2 (General) Migrant and scores points from the Resident Labour Market Test provisions of Appendix A, on the basis that his Sponsor has carried out a university milk-round,

iii. is applying as a Tier 2 (Intra-Company Transfer) Migrant in the Graduate Trainee sub-category, or

iv. was under the age of 26 on the date the application was made,

and is not applying for a grant of leave that would extend his total stay in Tier 2 and/or as a Work Permit Holder beyond 3 years and 1 month.

The "experienced worker" rate will apply in all other cases."

8. Mr Avery relied on the grounds. The appellant was clearly an experienced worker under the Rules.

9. Mr Cogan acknowledged that there was a difficulty in the outcome given that if the appellant complied with the relevant Rules it would not have been necessary to allow the appeal on the basis of an error of law. The appeal would simply have been allowed under the Rules. The determination was a short one and the respondent had not been represented which was unfortunate. However the judge, he submitted, had applied the Rules correctly and had correctly directed herself on the burden and standard of proof. He had only been in the employment for some three months and had no relevant work experience. He could be regarded as a new entrant to the labour market. The judge had heard oral evidence and accepted it. The word experienced should be interpreted in a common-sense manner. Mr Avery in response submitted that the question of whether the appellant was experienced or not was defined in the Rules. The appellant could not meet the Rules.

10. At the conclusion of the submissions I reserved my decision. I can of course only interfere with this decision if it was materially flawed in law.

11. It is of course unfortunate that the respondent was not represented at the hearing before the First-tier Judge. The appellant had claimed that he was not experienced and should be dealt with as a new entrant and I am invited in effect to adopt a common-sense interpretation of the word experienced. This approach is made slightly difficult in the light of what the judge records in paragraph 14 of her decision which I have reproduced above in which the appellant claimed to have real work experience in his field. However I am quite satisfied that when considering the meaning of the word one must have regard to the Immigration Rules and I have reproduced the relevant part above. That rule makes it quite clear that the "new entrant" rate will only apply in certain circumstances and that the "experienced worker" rate will apply in all other cases. The appellant had already been granted a Tier 2 (General) Migrant visa in October 2014 and the application under consideration in this case was an application made in December 2014 for an extension of that visa. On that basis the appellant was not a new entrant and it was not argued before me that he could bring himself within the relevant part of sub-paragraph (d) to qualify as such. Accordingly he fell to be dealt with as an experienced worker.

12. I see no answer to Mr Avery's submissions. While the judge accepted the evidence given by the appellant, that did not bring him within the rule as a new entrant. Had

it been the case that the judge was satisfied that the appellant did fall within the rule there was no reason as I have said to allow the appeal on the basis that she did. I respectfully agree that while it is open to a judge to accept submissions and incorporate them by reference into the determination, in this case the outcome is somewhat puzzling and the reasoning a little opaque.

13. For the reasons I have given, I am satisfied that the points made by Mr Avery make it clear that there was a material error of law in this decision and I remake it.

I substitute a fresh decision: this appeal is dismissed.

No anonymity direction made.

FEE AWARD

The First-tier Judge made no fee award and I make none.

Signed Date 3 May 2016

G Warr
Judge of the Upper Tribunal