



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/03698/2015

THE IMMIGRATION ACTS

Heard at Field House
On 27th February 2018

Determination & Reasons Promulgated
On 2nd March 2018

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

JAMIRU JAMAL MASSAQUOI
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T Ogunnabi, of Counsel, instructed by TM Legal Services

For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Sierra Leone born in 1979. He applied to remain in the UK as the spouse of Ms Aminata Jabbie who is a citizen of Ireland. The application was refused by the respondent on the basis it was not accepted that Ms Jabbie was working as claimed in a decision dated 30th November 2015. His

appeal against the decision was dismissed by First-tier Tribunal Judge Seelhoff in a determination promulgated on the 3rd April 2017.

2. Permission to appeal was granted by Upper Tribunal Judge Kamara on 8th January 2018 on the basis that it was arguable that the First-tier judge had erred in law in finding Ms Jabbie's employment was not genuine and effective.
3. The matter came before me to determine whether the First-tier Tribunal had erred in law.

Submissions – Error of Law

4. The appellant argues that the First-tier Tribunal errs in finding that he is not entitled to an EEA residence permit as a family member due to the finding that the appellant was not a qualified person by virtue of her work. It is said that it is accepted that the appellant has been employed by Sainsbury's since May 2015 and remains so employed (see paragraphs 3,11, 12 and 24 of the decision). The appellant had returned from maternity leave in January 2017 on reduced hours of 16 hours a week compared to her pre-maternity leave hours of 32 hours a week, and then had holiday owing which she took in January and February 2017, and which was thus reflected in her payslips up until March 2017.
5. It is said that the First-tier Tribunal erred firstly by finding that being paid holiday pay by her employer was not the same as Ms Jabbie being a worker, see paragraph 22 of the decision. This was contrary to the case of Genc v Land of Berlin 14/09, and clearly being paid holiday pay was an indication of being in employment.
6. Secondly it is said that the First-tier Tribunal erred by finding that Ms Jabbie's work was not genuine and effective. She was working 16 hours a week from January 2017. The duration of the employment is only one factor to take into account and not conclusive when determining whether someone is a worker under EEA law, see Barry v London Borough of Southwark [2008] EWCA Civ 1440. The question is whether it is so little time and money that it is unrelated to the lifestyle of a worker, as explained in the respondent's own guidance an example would be a student who works for two hours a week in the student union bar.
7. Thirdly it is said that the First-tier Tribunal made a factual error with respect to the appellant's immigration record as he did not return from Sierra Leone with a family permit as set out at paragraph 2 of the decision, which shows that the First-tier Tribunal has not properly appreciated the full facts of the case.
8. Mr Ogunnabi argued that the First-tier Tribunal had failed to be guided by EU law cases which he had set out in his grounds of appeal which indicated that the whole picture had to be examined. Ms Jabbie had a contract of employment, she was paying pension contributions, she was contracted to work between 76 and 80

hours a month, and had income from work as well as holiday pay in her final payslip.

9. There was no Rule 24 notice but Mr Lindsay argued that there was nothing in the third point. I agreed with this observation. He took the first two together and argued that the First-tier Tribunal had found that Ms Jabbie was employed but not doing genuine and effective work as she was on holiday leave, and even if it was accepted that this holiday leave had accrued in her maternity leave it meant that she could not, at that point, be seen as a qualified person as a worker. She should have waited and applied later for a residence permit when she had the payslip to show she was actually working, or produced alternative documentary evidence. It had also been an issue before the First-tier Tribunal that the documents had not been properly ordered by the appellant.

Conclusions – Error of Law

10. The First-tier Tribunal correctly directs itself to the definition of worker and the need for work simply to be genuine and effective and not marginal and ancillary at paragraph 6 of the decision.
11. I find however that the First-tier Tribunal erred not focusing on whether the work she did was genuine and effective in an overall sense. The history of her employment seems to have been brought irrelevantly into play prior to her current employment with Sainsburys when the primary question was whether she was currently a worker and not whether she had been in the past with previous employers. The evidence before the First-tier Tribunal was that she was employed with Sainsbury's as a customer services assistant and had submitted a contract of employment with them dated 2nd June 2015 and had remained in employment with them since that time having a year off (as is her right) for maternity leave between January 2016 to January 2017. Prior to this period of maternity leave, so between June 2015 and December 2015, Ms Jabbie earned £6241 in seven months, which is £891 a month. It is unclear whether the First-tier Tribunal found Ms Jabbie to be a worker at this stage, at paragraph 20 of the decision, but if it did not this was undoubtedly erroneous as an irrational conclusion on the evidence before the Tribunal. She had full employment rights in the UK and was not working a minimal, or marginally and ancillary, amount of time as reflected in her wage and was doing a real and effective job in the employment market.
12. As stated, in rather vague terms, at paragraph 21 of the decision maternity leave continues a worker's status. In the case of Jessie Saint Prix v Department of Work and Pensions C-507/12 the European Court of Justice found that a woman who gives up work in the late stages of pregnancy and the aftermath of childbirth retains the status of worker.
13. The position of the First-tier Tribunal, set out at paragraph 24 of the decision, that the appellant might not be a worker even if she worked 16 hours a week for Sainsbury's as a customer services assistant because she earns below the "primary

earnings threshold” is plainly irrational and erroneous. This level of real work is clearly genuine and effective when considered in the context of what she was doing, see Levin v Staatesseretaris van Justitie C-53/81. The questions that then arises is whether it was open to the First-tier Tribunal to find that she was not doing this level of work.

14. I find that the decision that whilst on paid holiday leave Ms Jabbie was not a worker to be erroneous due to insufficient reasoning: no case law is cited in support of this proposition concerning paid holiday leave, which would mean that those properly employed would cease to be workers whenever they were on holiday, and it fails, as Mr Ogunnabi has argued, to look at all the aspects of Ms Jabbie’s position as set out as the lawful approach by the Court of Appeal in Barry v London Borough of Southwark and in ECJ cases such as Genc v Land of Berlin.
15. I also find however that there is a more obvious error of law in the decision. The First-tier Tribunal was obliged to consider whether Ms Jabbie’s own evidence that she was no longer on paid holiday leave but was working 16 hours a week at the time of hearing as a customer services assistant was credible. She was not in a position to produce a payslip demonstrating this as her evidence was that her situation had changed since her last one and the next one was not due to be issued until after the date of hearing. If she was telling the truth then there was no issue of her being on paid holiday leave, and it was a straightforward issue of whether 16 hours a week work with Sainsburys, with a contract for this amount of time, on the check-out made her a worker in EU law. As indicated above I find that such evidence, if accepted, unarguably would have made Ms Jabbie a worker. This was therefore material evidence and the First-tier Tribunal needed to decide whether it accepted that evidence and failed to do so.

Submissions - Remaking

16. Mr Lindsay looked at the originals of Ms Jabbie’s current employment documents from Sainsburys. These show that she has been employed since 2015 on a contract for 16 hours work per week, and from January 2018 she is on a new period of maternity leave. He was satisfied that these documents were genuine. He invited me to make a decision on the evidence.

Conclusions - Remaking

17. I find that Ms Jabbie has been a worker employed with Sainsbury since June 2015 as a customer services assistant on a 16 hour a week contract, which I find to be genuine and effective work, and has evidenced being on maternity leave from this employment at the current time. Applying Jessie Saint Prix v Department of Work and Pensions I find that Ms Jabbie remains a worker at the current time.
18. As Ms Jabbie is a worker in community law then her husband, the appellant, is entitled to an EU residence card as her family member.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. I set aside the decision of the First-tier Tribunal.
3. I re-make the decision in the appeal by allowing it under the EEA Regulations.

Signed: *Fiona Lindsley*
Upper Tribunal Judge Lindsley

Date: 28th February 2018

Fee Award Note: this is **not** part of the determination.

In the light of my decision to re-make the decision in the appeal by allowing it, I have considered whether to make a fee award. I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals. I have decided to make no fee award because the outcome of the appeal relied upon evidence produced before the Upper Tribunal and because no such award was pursued by the appellant.

Signed: *Fiona Lindsley*
Upper Tribunal Judge Lindsley

Date: 28th February 2018