



**Upper Tribunal
(Immigration and Asylum Chamber)
EA/09242/2016**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On 26 March 2018

**Decision &
Promulgated**

On 10 April 2018

Reason

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

**TOUFIK RAIB
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Wells (counsel) instructed by M & K Solicitors

For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Lodge promulgated on 15 August 2017, which dismissed the Appellant's appeal against the respondent's refusal to issue confirmation of a permanent right to reside in the UK under the Immigration (EEA) Regulations 2006.

Background

3. The Appellant was born on 18 April 1979 and is a national of Algeria. On 18 July 2016 the Secretary of State refused the Appellant's application for confirmation of a permanent right to reside in the UK under the Immigration (EEA) Regulations 2006.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Lodge ("the Judge") dismissed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 31 January 2018 Judge Keane gave permission to appeal stating

The appellant applied, in time, for permission to appeal against the decision of Judge of the First-tier Tribunal Lodge promulgated on 15 August 2017 in which the Judge dismissed the appeal under the Immigration (EEA) Regulations 2006. The grounds disclose arguable errors of law but for which the outcome of the appeal might have been different. First, on a fair construction of the respondent's reasons for refusal letter dated 20 July 2016 (page 1 of 4) the respondent made an unequivocal concession that the appellant's EEA national sponsor was employed for a continuous period of five years, the respondent did not withdraw the concession at the hearing, the Judge found at paragraph 17 of his decision that he was not satisfied that the sponsor was continuously exercising treaty rights in the UK for the period of five years and the Judge, by not alerting the appellant to his finding that he was to resile from the respondent's unequivocal concession, arguably acted unfairly. The arguable unfairness arguably made a material difference to the outcome of the appeal. Secondly, in relying upon the sponsor's arguably low earnings for the period of 12 months ending in April 2012 in support of a finding that the sponsor's work should be regarded "as purely marginal and ancillary" (paragraph 21 of the Judge's decision) the Judge arguably applied an incorrect test. By reason of propositions established in authorities to which reference was made in the grounds the correct test, which the Judge arguably did not apply, was whether the work which the sponsor was doing was "genuine and effective". The Judge's arguable error of law was made more profound by the Judge's finding at paragraph 21 of his decision that the sponsor's employer, "... Must have had some economic value from her [the sponsor's] employment...". The application for permission is granted.

The Hearing

5. (a) For the appellant, Mr Wells moved the grounds of appeal. He told me that the respondent's decision contains a concession that the EEA

national sponsor worked continuously for five years, but at [17] and [18] the Judge goes behind that concession to make his own findings that for the 17-month period between 2011 and 2012 the EEA sponsor was not working. Mr Wells told me that that finding creates procedural unfairness because the appellant was deprived of the opportunity of addressing that matter. He told me that the finding is material because it forms the foundation for the Judge's decision to dismiss the appellant's appeal.

(b) Mr Wells reminded me that at [18] the Judge acknowledges that he goes behind a clear concession form which the appellant benefits. He told me that at [21] the Judge makes contradictory findings, because the Judge finds that the sponsor's earnings were so low that her employment must be regarded as marginal and ancillary, but in the same paragraph he accepts that the sponsor's employment has economic value. He relied on the case of Levin v the Secretary of State for Justice [1982] ECR 1035; Kempf v Stasteertaribn Van Justitie [1986] ECR 1741 and Begum (EEA – worker – Jobseeker) Pakistan [2011] UKUT 00275 (IAC).

(c) Mr Wells urged me to allow the appeal and set the decision, promulgated on 15 August 2017, aside. He asked me to remit this case to the First-tier Tribunal to be decided afresh.

6. (a) For the appellant, Mr Bramble accepted that the Judge has gone behind a concession which the Secretary of State made and did not withdraw, but told me that the focus of the decision was on the EEA sponsor's earnings. He told me that the EEA sponsor's earnings fell below the HMRC national insurance primary earnings threshold (PET) for the years 2011/2012; 2012/2013; 2013/2014 and 2014/2015.

(b) Mr Bramble drew my attention to Regulation 6 of the 2006 regulations. He told me that the Judge was entitled to take a gap in employment into account and that the Judge was correct to consider whether the employment was effective & genuine. He told me that although the decision contains an error, on the whole the Judge dealt with the appeal sufficiently. Mr Bramble conceded that there may be a requirement for further fact-finding in this case.

Analysis

7. In the reasons for refusal letter the respondent sets out the EEA national's earnings between 2008 and 2015, and then says

Whilst you have demonstrated that your sponsor has been employed within the United Kingdom for a continuous period, her income fails to meet the HMRC national insurance primary earnings threshold (PET) for the majority of years.

8. That is a clear concession that the EEA sponsor was employed between 2008 and 2015. The respondent draws a clear focus on the level of the sponsor's income and argues that the EEA national's activity is not

effective and genuine and is on such a small scale that it is regarded as purely marginal and ancillary.

9. The Judge starts [17] of the decision by saying

Although neither party made this point....

The Judge then finds that the EEA national sponsor was not employed between June 2011 and November 2012. That finding is an entirely new matter, about which the appellant has had no notice. It is a matter which was not raised during the hearing so that it was not addressed by either party. It is the matter which the Judge finds to be determinative of the appeal - yet neither party to the appeal had any notice of it. Neither party to the appeal had any opportunity to address the deciding factor in the appeal.

10. Is not surprising that the Judge starts [18] by confessing to some hesitancy in making the finding, but that hesitancy did not prevent the Judge from resting his decision on that finding

11. In SS v Secretary of State for the Home Department [2010] CSIH 72 the Secretary of State considered that it was credible that the Claimant had been involved in film production. The Judge did not accept that the Claimant was a filmmaker. The Court of Session noted that the Judge had before him, as a starting point as to the veracity of the Claimant's version of events, an acceptance by the Secretary of State that the Claimant was a filmmaker. Although the Judge was not bound to accept that conclusion, any departure from a position established as true by both parties would require explanation. In its absence, the reasonable inference was that the Judge had misunderstood or left the evidence out. The error was therefore properly categorised as one of law.

12. The Judge's findings of fact at [17] and [18] are clear departures from the reasoning behind the respondent's decision. The Judge's findings are that the concession made by the respondent should not have been made, yet neither of the parties to the appeal were made aware of that finding until the decision was promulgated. Neither the appellant nor the respondent has had the opportunity to address the Judge's finding that the sponsor stopped work between June 2011 and November 2012. The result is that the proceedings are tainted by unfairness. That unfairness leads to a material error of law. I must set the Judge's decision aside.

13. I consider whether or not I can substitute my own decision but find that I cannot do so because of the extent of the fact-finding exercise necessary. Both parties agree that further fact finding is necessary on this case.

Remittal to First-Tier Tribunal

14. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 the case may be remitted to the First-tier Tribunal if the Upper Tribunal is satisfied that:

(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

15. In this case I have determined that the case should be remitted because a new fact-finding exercise is required. None of the findings of fact are to stand and a complete re-hearing is necessary.

16. I remit this case to the First-tier Tribunal sitting at Birmingham to be heard before any First-tier Judge other than Judge Lodge.

Decision

17. The decision of the First-tier Tribunal is tainted by material errors of law.

18. The Judge's decision, promulgated on 15 August 2017, is set aside. The appeal is remitted to the First-tier Tribunal to be determined afresh.

Signed Paul Doyle

Date 3 April 2018

Deputy Upper Tribunal Judge Doyle