Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/05678/2018**

THE IMMIGRATION ACTS

Heard at Field House
On 14 February 2019

Decision & Reasons Promulgated
On 19 February 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OPEYEMI TAOFEEK AYINIA

Respondent

Representation:
For the Appellant: Mr T Wilding, Senior Home Office Presenting Officer
For the Respondent: Appellant in person

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. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal.

This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Spicer, promulgated on 21 November 2018 which allowed the Appellant's appeal.

Background

3. The Appellant was born on 28 August 1986 and is a national of Nigeria. On 10 February 2018 the Secretary of State refused the Appellant's application for indefinite leave to remain in the UK on the basis of 10 years lawful residence.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Spicer ("the Judge") allowed the appeal against the Respondent's decision. Grounds of appeal were lodged and, on 27 December 2018, Judge Hollingworth granted permission to appeal stating

> "The sole issue as the Judge states this at paragraph 22 of the decision relates to paragraph 322(5). It is arguable that the Judge has not sufficiently engaged with the matrix of factors put forward by the respondent in the case dealing with the relationship between the totality of hours capable of or potentially worked and the receipt of income upon which the appellant was taxed. It is arguable that the evidential burden switched and that insufficient evidence was adduced by the appellant. In the alternative it is arguable that the inference is capable of being drawn from the hourly rate given that the appellant worked for the same employer and given the type of work would not support the conclusion reached by the Judge in relation to 20 hours a week of work over the relevant periods."

The Hearing

5. (a) Mr Wilding moved the grounds of appeal. He told me that at [19] the Judge summarises the evidence, and then at [27] & [28] the Judge makes findings of fact which, Mr Wilding said, are unsustainable because the Judge did not properly analyse the periods for which the appellant worked between the tax years from 2013 to 2015. He told me that it is not disputed that the appellant worked, and it is not disputed that the figures for his income were accurate. Mr Wilding argued that it is difficult to reconcile the amount the appellant earned in each tax year with the hours that the appellant was allowed to work. He said that the appellant would have to have an hourly rate of pay more than £30 per hour if he had worked within the permitted hours only.

(b) Mr Wilding told me that the Judge's error was to take the total figure that the appellant earned each tax year and not compare that against the short period for which the appellant was allowed to work. He told me that the absence of that analysis is a material error of law. He urged me to set the decision aside and to continue the case to a further hearing in this tribunal so that another decision can be substituted.

6. The appellant told me that the decision does not contain an error of law, material or otherwise. He told me that he was allowed to work for 20 hours each week as a student and allowed to work full-time during his holidays. He told me when the holiday periods are factored into the calculation, it could be seen that he did not work when he was not allowed to do so. The appellant told me that he has lived in the UK for 18 years. He worked honestly and paid tax on his earnings. He told me that he has been treated unfairly by the Secretary of State because, if there was a discrepancy, it should have been picked up in earlier applications made over the last five years. He emphasised that he is a law-abiding citizen. He asked me to dismiss the appeal and allow the Judge's decision to stand.

Analysis

7. The appellant accepts that three grants of leave to remain contained a condition prohibiting either working or recourse to public funds. The Judge finds at [27] that from 6 April 2013 to 12 August 2013 the appellant had permission to work and from 21 February 2015 to 5 April 2015 the appellant had permission to work. The appellant insists that he has not worked in breach of the conditions of leave to remain UK.

8. The figures obtained from HMRC for the appellants earned income for the tax years 2013/14 and 20 14/15 go without challenge. In submissions to the First-tier Tribunal, the respondent's position was that the appellant was not allowed to work between 12 August 2013 and 1 April 2014; between 3 April 2014 and 30 July 2014; and between 10 October 2014 and 26 January 2015.

9. There was no evidence of the appellant's hourly rate of pay, and no submissions were made by the respondent about the nature of the appellant's employment, nor about the appellant's earning capacity, nor about the appellant's hourly rate of pay. No evidence was produced from HMRC. The appellant simply accepted the figures rehearsed in the reasons for refusal letter.

10. The respondent's assertion that the appellant worked in breach of his conditions has consistently been met with a blanket denial by the appellant. The respondent did not produce evidence of the appellant's earnings, nor of the appellant's national insurance contributions. The respondent produced no evidence of the dates that the appellant worked. The arithmetical calculation contained at 1(d) & (e) of the respondent's grounds of appeal was not argued before the First-tier Judge.

11. In the absence of evidence to support the respondent's position, it was open to the Judge to make the findings at [27] of the decision and to reach the conclusion at [28] of the decision – that on the evidence led, and on the facts as the Judge found them to be, it is not possible to be satisfied that the appellant breached the conditions of leave to remain in the UK.

12. The conclusion at [28] is sustainable and does not contain a material error of law. In the absence of evidence from which the Judge could have made findings of fact the respondent wants the Judge to proceed on an assumption. The Judge is correct not to do so.

13. The Judge's decision takes an unfortunate turn at [29] and [30] where the Judge considers paragraph 322(5) of the immigration rules, when in fact the respondent's decision was made by reference to 322(3). Mr Wilding told me that he would not pursue that point. He candidly accepted that if [28] stands, then [29] and [30] are irrelevant

14. In Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) the Tribunal held that (i) Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge; (ii) Although a decision may contain an error of law where the requirements to give adequate reasons are not met, the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the judge draws from the primary data were not reasonably open to him or her.

15. A fair reading of the decision demonstrates that the Judge applied the correct test in law. The Judge carried out a holistic assessment of all of the evidence. There is nothing wrong with the Judge's fact-finding exercise. There was no reliable evidential basis before the Judge for what is now argued before me. The respondent might not like the conclusion that the Judge arrived at, but that conclusion is the result of the correctly applied legal equation. The correct test in law has been applied. The decision does not contain a material error of law.

16. The decision does not contain a material error of law. The Judge's decision stands.

DECISION

17. The appeal is dismissed. The decision of the First-tier Tribunal, promulgated on 21 November 2018, stands.

Signed Date 14 February 2019

Deputy Upper Tribunal Judge Doyle