Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/16358/2019**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Heard on 5 January 2022	**On the 28 February 2022**
Prepared on 12 January 2022	

Before

UPPER TRIBUNAL JUDGE BLUM
DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR MOHAMMAD MAHBUB KHAN
(Anonymity order not made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Biggs Counsel
For the Respondent: Mr T Lindsey, Home Office Presenting Officer

REASONS FOR FINDING A MATERIAL ERROR OF LAW

The Appellant

1. The Appellant is a citizen of Bangladesh born on 20 November 1987. His appeal against a decision of the Respondent dated 17 September 2019 was allowed by a Judge of the First-tier Tribunal sitting at Taylor House on 29 November 2019. Although the matter came before us as an appeal by the Respondent (with a Rule 24 response from the Appellant) for the sake

of convenience we shall continue to refer to the parties as they were referred to at first instance.

2. The Respondent's decision was to refuse the Appellant's application for indefinite leave to remain. The application was made on the basis of ten years lawful and continuous residence. The Respondent's refusal was on the grounds of suitability pursuant to paragraph 276B(ii) and (iii) and paragraph 322(5) of the Immigration Rules. The Appellant was considered not suitable as he was a Company Director of a business, Khan & Co Ltd, which employed an illegal worker, Mr Shaffique Miah in the company's restaurant and there was no evidence that a right to work check was conducted before employment.

The Appellant's Case

3. The Appellant accepted that he had been a Company Director for Khan and Co but was not by the time that Mr Miah was employed. He had sold and transferred his business on 2 November 2018 and Mr Miah was employed from 9 November 2018 until 15 November when immigration officers attended the premises. A Civil Enforcement Notice levying a penalty of £10,000 was served on the company pursuant to section 15 of the Immigration, Asylum and Nationality Act 2006. Mr Ali who had agreed to buy the business from the Appellant arranged with the Respondent to pay the civil penalty. The Appellant did not know Mr Miah and was not responsible for employing him.

The Decision at First Instance

4. At paragraph 36 of the determination, the Judge found it "too much of a coincidence" that Mr Miah happened to mention the Appellant was the person who had employed him. The Appellant "just happened" to be the previous owner who "just happened" to be at the restaurant the night that immigration officers attended. Mr Miah did not attend to give evidence, neither did Mr Ali said to be the new owner. The Judge found the absence of these witnesses "telling" and rejected the claim that the business had been sold to Mr Ali. The Judge was satisfied that the Appellant had employed an illegal worker in breach of section 15, see paragraph 39. At paragraph 40, the Judge stated that he was nevertheless allowing the appeal because "the Appellant has had an unblemished immigration record with the exception of having employed an illegal worker on one occasion for a very short period … This is not sufficient to persuade me that his claim should be refused on grounds of suitability under 276B(ii) and paragraph 322(5)."

The Onward Appeal and Rule 24 Response

5. The Respondent appealed this decision arguing that the Judge had "found the appellant to be untruthful and to be providing a fabricated account" but "did not hold these findings against the appellant". It was perverse for the Judge to say that the Appellant's immigration record apart from

the employment of an illegal worker was unblemished. Granting permission to appeal, the First-tier Tribunal found it arguable that the Judge's conclusion, at paragraph 40 of the determination was inadequate. There was no explanation of how the Judge had weighed the Appellant's maintenance of innocence (to the Respondent and the Tribunal), why the Judge did not find 322(5) engaged or what, if any, finding had been made on whether the Appellant had been deceptive.

6. The Appellant filed a Rule 24 notice which argued that the Respondent had not refused the Appellant's application because of dishonesty on the Appellant's part but because of the allegation of illegal employment. The Respondent was not represented at first instance and could not therefore rely on an allegation of dishonesty at the hearing as the Respondent had sought to in her grounds of onward appeal. Merely employing an illegal worker without conducting the required checks was not sufficiently reprehensible to justify a finding of unsuitability. The reasons given for the FTT's decision were legally adequate and rational although the FTT had erred in finding the Appellant had employed Mr Miah, when the civil penalty was imposed on the limited company. The FTT had ignored the distinction between the appellant and Khan and Co. Limited.

The Hearing Before Us

7. In oral submissions the Presenting Officer submitted that the Judge had wrongly disregarded the Respondent's view that the employment of an illegal worker made the Appellant unsuitable for a grant of leave to remain. It could not be discerned from the determination why the Appellant's conduct had not engaged 322(5) of the Immigration Rules. The Appellant's conduct was of a type that undermined the immigration system. The Appellant was in sole control of the company and had employed Mr Miah. Even though the Appellant's conduct (apart from this incident) was blameless, that was a neutral factor as people were expected to obey the law. The Appellant had compounded his conduct by lying about it to the FTT. The statement of Mr Miah was cogent evidence of his employment.

8. For the Appellant, counsel relied upon his skeleton argument. Even if (contrary to his case) the Appellant was in control of the company at the material time, he had not himself been served with notice of a civil penalty and had not himself breached the law. The FTT had not found that the Appellant gave dishonest evidence, it had merely decided not to accept his evidence which was not the same thing. Cogent evidence was required before a finding of dishonesty could be made. In the absence of aggravating factors and/or a finding of dishonesty it could not be said that the Appellant's presence in the United Kingdom was undesirable.

9. In oral submissions, counsel argued that the matters raised today by the Respondent see [7] above, had not been pleaded. In paragraph 40 the Judge did give reasons for the decision. The civil penalty regime relied upon by the Respondent in the refusal letter, was not fault based, it was

strict liability. The Judge had not explored whether it was an oversight that Mr Miah had been employed. The Judge erred in relying on the absence of witnesses for the Appellant when the Respondent's evidence was only a statement of case. In reply the Presenting Officer stated that the Respondent's challenge was that the Judge had misdirected himself.

Discussion

10. The respondent's decision under appeal was that the appellant had failed to meet the suitability criteria because he had employed someone illegally in breach of section 15 of the 2006 Act. The FTT judge accepted that the appellant had indeed employed someone illegally but in a very brief paragraph decided that the appellant's 10 years in this country with no other blemishes meant that this one act of employing someone illegally could not persuade him that the appellant was indeed unsuitable for a grant of leave.

11. The heading for this part of the Immigration Rules indicates that paragraph 322(5) is a ground which if proved should normally lead to a refusal of an application (our emphasis). The use of the word normally indicates a discretion on the part of the decision maker but that discretion must be exercised judicially. There is no entitlement to say that despite any evidence to the contrary the appeal will nevertheless be allowed. The use of the words "normally refused" is an indication that there must be some consideration of the public interest, in effect a balancing act, balancing the appellant's personal circumstances against the public interest in enforcing immigration control. It is difficult to see how the judge has done that in this case given the paucity of reasoning at paragraph 40.

12. The judge found that the conduct complained of by the respondent in the refusal letter had been committed by the Appellant. The civil penalty regime had been established by the 2006 Act. It must be the case that when exercising a discretion some weight must be attached by the decision maker to a breach of the statute. How much weight is fact specific but there is no indication in paragraph 40 of what weight if any the judge had given to the public interest in this matter.

13. The respondent challenged the judge's decision partly for lack of reasoning and partly for perversity. It was said to be perverse that the judge had found that the appellant's evidence to the court was untrue yet had not apparently concluded that was an aggravating factor also to be taken into account. It was a matter for the Judge whether or not there had been a breach of section 15. However, as the respondent pointed out to us in argument, it could not be seen from the determination what weight if any had been given by the judge to the fact that the appellant had put forward an account concerning the circumstances in which Mr Miah came to be present at the restaurant which the judge had found to be false.

14. For these reasons we find that it was not possible for the losing party, in this case the Respondent to know with reasonable certainty why she had lost the appeal. Paragraph 39 had set out in some detail the judge's reasons for not accepting the Appellant's case but Paragraph 40 does not follow on from that reasoning. The FTT's decision must be set aside as it contains a material error of law since there is no attempt by the Judge to balance the public interest contained in section 15 against the personal circumstances of the appellant.

15. The appellant's challenge to the determination is, inter alia, that the judge was wrong to find that it was the appellant who had employed an illegal worker since it was the limited company that received the civil penalty notice. The argument is that this is not a criminal matter and therefore the veil of incorporation should not be pierced such that a director of the company be made personally liable for the actions of the company. At the stage of the refusal, it is submitted there was no issue as to the Appellant's dishonesty.

16. The decision of the FTT cannot stand and must be set aside and the decision on the appeal be remade. There is a factual dispute in this case but the FTT's findings cannot be preserved since such findings cannot be separated from the weight to be placed upon them. It is not known whether for example, the findings amounted to an aggravating feature. The appellant may therefore call further evidence on the issue of whether he or the company employed Mr Miah although if his witnesses again fail to attend to give evidence it would be a matter for the trial judge to decide whether that is a relevant factor in the assessment of the appellant's credibility. The absence of witnesses can in some circumstances be relevant, if for example it is evidence which is readily available but not called. It will also be open to the appellant to bring evidence as to article 8 should he so wish.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and we set it aside. We direct that the appeal be remitted back to the First-tier Tribunal to be reheard de novo.

The Respondent's appeal allowed to that limited extent

We make no anonymity order as there is no public policy reason for so doing.

Signed this 12 January 2022

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Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

As we have set aside the decision of the First-tier Tribunal we also set aside the fee award made by the First-tier. The issue of a fee award will have to be decided at the resumed hearing in the First-tier.

Signed this 12 January 2022

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Judge Woodcraft
Deputy Upper Tribunal Judge