EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 74
P1052/15

Lord Brodie
Lord Drummond Young
Lord Malcolm

OPINION OF THE COURT

delivered by LORD BRODIE

in the Reclaiming Motion

by

OKO O-ONO

Petitioner and Reclaimer

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Petitioner: Caskie, Advocate; Drummond Miller LLP
Respondent: McIver, Advocate; Office of the Advocate General

6 December 2018

Introduction

[1] The petitioner in this application for judicial review is Oko O-Ono. He was born on 28 September 1979. He is a national of Nigeria. He is an engineer. He holds a BSc in Geology and Mining and an MSc in Petroleum Engineering. He entered the United Kingdom in September 2010 with a student visa. Having applied for permission to remain, on 6 January 2015 he was granted leave to remain until 6 January 2018 as a migrant under

Tier 1 (Entrepreneur) of the Points Based System. The grant was conditional. Attached to the letter of 6 January 2015 granting leave was a schedule providing information about Tier 1 (Entrepreneur) migrants. The schedule included a number of questions and answers. The first question was: "Do I need permission to work in the UK?" The answer was:

> "Having been granted leave to remain as a Tier 1 (Entrepreneur) Migrant, your employment is restricted to the following: ... you are not permitted to undertake employment other than working for the business(es) you are establishing, joining or taking over."

[2] The respondent is the Secretary of State for the Home Department and as such responsible for the enforcement of immigration control in the United Kingdom.

[3] On 10 September 2015 immigration officers called at the petitioner's home in Aberdeen. They asked the petitioner questions. They carried out a search. They recovered: (i) a series of payslips in the petitioner's name from Search Consultancy Limited ("Search") dated 10, 17 and 24 April 2015; (ii) a letter from Search terminating the petitioner's employment from 19 April 2015 dated 23 July 2015; (iii) parts 1A and 2 of the petitioner's P45 document from HMRC (in which the employer name is given as Search); (iv) a contract of employment for the Aberdeen Alarm Company Limited ("Aberdeen Alarm") signed by the petitioner and dated 15 May 2015; and (v) a series of invoices in the name of the petitioner addressed to Aberdeen Alarm.

[4] The immigration officers thereupon detained the petitioner. They then served on him a Notice of Curtailment of his leave to remain with immediate effect, in terms of section 10 of the Immigration Act 1999. The Notice of Curtailment stated that the petitioner was working (as a security guard) in breach of the conditions of his leave to remain.

[5] Pursuant on the Notice of Curtailment, on 15 September 2015 the respondent issued Removal Directions for the removal of the petitioner from the United Kingdom to Lagos on 19 September 2015.

[6] There are no provisions for appeal from the decision to issue a Notice of Curtailment or Removal Directions.

[7] On 18 September 2015 the petitioner presented this petition for judicial review. He seeks reduction of the respondent's decision, expressed in the Notice of Curtailment, that the petitioner is a person liable to be removed from the United Kingdom.

Procedural history

[8] This petition has had a lengthy procedural history. Consideration of the interlocutor sheet provides an explanation. For good reason or otherwise, the process has been subject to a number of sists (suspensions of procedure).

[9] The date of presentation of the petition preceded the introduction of the requirement for a grant of permission to proceed. A substantive first hearing was fixed for 11 February 2016. That hearing was discharged on the unopposed motion of the petitioner and a new hearing date fixed for 6 May 2016. On 6 May 2016 a minute of amendment for the petitioner was received and the petition was sisted until 8 November 2016 "for the outcome of the relevant test cases". On 30 November 2016 the petition was again sisted for a further three months to await the outcome of the cases of *Joseph Odion Ochiemhen* and *Onyeka Kingsley Menuba*. A first hearing before the Lord Ordinary took place on 6 July 2017. On 9 August 2017 the Lord Ordinary refused the petition.

[10] The petitioner reclaimed (appealed) against the Lord Ordinary's decision.

[11] On 29 August 2017 and subsequent dates the reclaiming motion was sisted until 3 April 2018. We assume that the reasons for this were connected with the petitioner's application for legal aid.

The issue for decision by the Lord Ordinary

[12] In the statement of issues lodged by the petitioner prior to the hearing before the Lord Ordinary in compliance with the case management order of 6 April 2017, the petitioner identified the issue raised by the petition as being whether the Secretary of State for the Home Department properly exercised the discretion open to her in reaching a decision that the petitioner had breached the terms of his Tier 1 (Entrepreneur) Visa having regard *inter alia* to the provisions of Chapter 50 of her Enforcement Instructions and Guidance policy.

[13] The petitioner quotes that part of the Enforcement Instructions and Guidance policy on which he relies at statement 9 of the petition;

> "The breach of working conditions must be of sufficient gravity to warrant such action (administrative removal). There must be firm and recent evidence … of working in breach including one of the following:-
>
> An admission under caution and charge;
> A statement by the employer implicating the suspect;
> Documentary evidence;
> Sight by the IO (Immigration Officer) … of the offender working, preferably on two or more occasions, or on one occasion over an extended period, or of wearing the employer's uniform. In practice this should generally be backed up by other evidence."

The terms of the petitioner's leave to remain: Tier 1 (Entrepreneur)

[14] Chapter 10 of *Macdonald's Immigration Law & Practice* (9th edition, 2014) explains the Points Based System ("PBS") for the management of migration by non-EEA nationals which was introduced in 2008. The system is "points based" in the sense that entitlement to remain

depends on an applicant achieving a score which is the aggregate of the points awarded for certain attributes, including the availability of funds. At paragraph 10.2 Macdonald notes that Tier 1 of the PBS was designed to allow "high value" migrants to enter or remain in the United Kingdom. It is seen as of importance to the United Kingdom as a means of attracting foreign entrepreneurs, investors and individuals of exceptional talent with a view to promoting economic growth. Immigration Rule 245D states the purpose of the sub-tier, Tier 1 (Entrepreneur) as: "This route is for migrants who wish to establish, join or take over one or more businesses in the UK". As Macdonald puts it, at paragraph 10.25, it is for use by business investors who wish to set up, take over, or be actively involved in the running of a business. 245DD (i) requires the applicant to provide a business plan, setting out his proposed business activities in the United Kingdom and how he expects to make his business succeed.

[15] Mr Caskie, who appeared for the petitioner, confirmed that the petitioner had provided such a business plan and in statement 7 of the petition the petitioner acknowledges that he was granted leave to remain in order to set up a business in the United Kingdom. The business was that of a Scottish registered limited company called Omega Geoservices and Consultancy Ltd ("Omega") offering machinery inspection and testing services in the oil and gas sector. It is averred in the petition that, through Omega, the petitioner offered his services between 6 January 2015 and the termination of his permission to remain on 10 September 2015, albeit that only one contract (with Velosi Europe Limited) was agreed in this period. Two invoices relating to work under that contract were produced, one for services rendered in July 2015 amounting to £1905.35 inclusive of VAT and the other for services in August 2015 in the sum of £3766.80. The petitioner's business plan did not include him working as a security guard.

[16] As appears from the respondent's Tier 1 (Entrepreneur) of the Points Based System – Policy Guidance (the "Policy Guidance"), the PBS "pass mark" for a Tier 1 (Entrepreneur) grant of leave to remain is 75 points for relevant attributes (in addition to points for English language and funds for maintenance). A total of 25 points is awarded for having access to not less than £50,000 by way of funding. When making his application for leave the petitioner satisfied the respondent that he had access to such funding.

[17] Paragraph A41 of Annex A to the Policy Guidance (which states that it should be read with paragraphs 245D to 245DF of the Immigration Rules) provides, under the heading Genuine Entrepreneur Activity (contract of service with another business):

> "A41. If you are granted leave to enter or remain as Tier 1 (Entrepreneur) migrant, your leave will prohibit you from engaging in employment except where you are working for the business which you have established, joined or taken over. You will comply with this restriction if, for example, you are employed as the director of the business in which you have invested, or if you are working in a genuine self-employed capacity. In this capacity you will have a contract for services.
>
> You may not, however, be considered to be working for your own business if the work you undertake amounts to no more than employment for another business (for example, where your work amounts to no more than filling of a position or vacancy with, or the hire of your labour to, that business, including where it is undertaken through engagement with a recruitment or employment agency). In this capacity you would have a contact (sic) of service. This applies even if it is claimed that such work is undertaken on a self-employed basis.
>
> In considering whether your work amounts to genuine self-employment (and is therefore work for the business which you have established, joined or taken over) or is in fact employment by another business, we will take into consideration the factors set out at: www.hmrc.gov.uk/employment-status/index.htm#1.
>
> If your work amounts to no more than employment by another business, we may consider you to be working in breach of your conditions of stay, and that you are therefore liable to curtailment of your stay and/or removal from the United Kingdom."

[18] Paragraph A1 of Annex A defines "a business" as "an enterprise which is a sole trader; or a partnership; or a company registered in the United Kingdom".

[19] The petitioner's grant of leave was set out in a letter dated 6 January 2015 and headed "Application for Leave to Remain under Tier 1 (Entrepreneur) of the Points Based System". As we have already observed, attached to that letter was a schedule providing information about Tier 1 (Entrepreneur) migrants. The schedule included a number of questions and answers. The first question was: "Do I need permission to work in the UK?" The answer was:

> "Having been granted leave to remain as a Tier 1 (Entrepreneur) Migrant, your employment is restricted to the following: … you are not permitted to undertake employment other than working for the business(es) you are establishing, joining or taking over."

The approach of the Lord Ordinary

[20] Having noted the terms of the Letter granting leave to remain and the terms of the Policy Guidance, the Lord Ordinary observed, correctly, that the respondent has the power to curtail leave to remain. That power derives from section 3(3)(a) of the Immigration Act 1971. The basis for curtailing leave to remain is set out in Rule 323 of the Immigration Rules. Rule 323 refers back to grounds set out in Rule 322. These include Rule 322(3) which provides that leave can be curtailed where there has been "failure to comply with any conditions attached to the grant of leave to enter or remain". Accordingly, the petitioner was subject to his right to remain being curtailed if he failed to comply with any condition of his grant of leave.

[21] The petitioner had argued that since the Policy Guidance permitted him to commence and run businesses other than that which was proposed to be conducted by Omega, he was at liberty to work as a security guard. He further argued that in reaching the decision to terminate the petitioner's leave to remain, the respondent had left out of account information which showed that the petitioner was not an employee and that he had sought

to provide his services as a security guard as an independent contractor trading under a trading name, "Prime Enterprises". Invoices purporting to bear this out were lodged. The petitioner had argued his work as a self-employed person for Aberdeen Alarm was not in breach of his permission to remain. It had also been argued that where work was undertaken which was ancillary to the business of Omega this work should not be regarded as a separate form of employment but was work which was covered by his permission to provide services of the type offered by Omega. It was argued that employment, whether on an employed or self-employed basis, which was undertaken so as to develop business links with potential clients in the sector in which Omega traded, was work within the scope of his leave. It was argued that in light of this the respondent should have exercised the discretion under the Policy Guidance to permit the petitioner to remain.

[22] In addressing these arguments the Lord Ordinary noted that whereas the petitioner was only permitted to remain in the United Kingdom if he was employed with a business which he had "established, joined or taken over", the pay slips and P45 to which he had been referred showed that the petitioner had been employed by Search. This was not a business that the petitioner had established, joined or taken over. Accordingly, in the opinion of the Lord Ordinary, in taking up employment with Search the petitioner had taken employment outside the scope of his permission. In relation to the petitioner's relationship with Aberdeen Alarm, the petitioner had argued that the invoices rendered by him to that company had not been properly considered and supported the proposition that he had not been in breach of his leave. The Lord Ordinary rejected both contentions. There was no reason to think that the invoices had not been considered by the respondent but, in any event, the Lord Ordinary did not consider that the invoices were capable of altering the view the respondent took of the petitioner's conduct. While the Policy Guidance

distinguished employment from self-employment, both were legitimate ways in which a person can work for the business that has been established, joined or taken over. The underlying requirement of the Tier 1 (Entrepreneur) leave to remain was that the work of the entrepreneur must be for the business that the entrepreneur has established. The entrepreneur was entitled to branch out into another business than that described in his business plan and when he did so it did not matter whether the employment with the new business was in a self-employed or employed capacity; provided the justification for granting leave to remain applied to the new business venture as it did to the original business venture there is no breach of the conditions of leave. The key was whether the entrepreneur was working, whether as an employee or a self-employed contractor, for the benefit of a business which the petitioner had established, joined or taken over, in other words whether there was genuine entrepreneurial activity.

[23] The Lord Ordinary rejected the petitioner's contention that his work as a security guard could have benefited his work for Omega in the oil and gas sector. He did not accept that there was any indication that the petitioner intended Omega to branch out into the security business. Rather, what was indicated was that the petitioner had taken up employment with a business that he had not established, joined or taken over. In these circumstances the respondent was entitled to take the view that the petitioner was supplementing his income from Omega with casual labour in the security sector. This was not work which was within the scope of his leave to remain.

Grounds of appeal

[24] The petitioner's grounds of appeal are articulated in six overlapping paragraphs. They can be summarised in two propositions:

1. The Lord Ordinary erred in law by proceeding on the basis that in order for the petitioner to comply with the conditions of his leave to remain there required to be a relationship between the nature of the work he did and the nature of work the petitioner had proposed to do when applying to the respondent for leave.

2. The Lord Ordinary failed to ask the correct question which was whether the petitioner had been employed by Search or Aberdeen Alarm; contrary to what the Lord Ordinary had said was the case, the petitioner's employment status was the central matter which the Lord Ordinary required to explore.

Submissions of parties

The petitioner

[25] Mr Caskie explained that he had little to say beyond what appeared in the Grounds of Appeal and his Note of Argument. The petitioner had been granted leave to remain as a Tier 1 Entrepreneur. When applying for leave in that category he was required, *inter alia*, to demonstrate to the respondent that he had plans to establish a viable business in the United Kingdom. He did that and was accordingly granted leave on the basis of establishing Omega and, through Omega, he had offered his services to the oil and gas sector after leave to remain was granted. However, there was no restriction on the industry or sector in which the petitioner was permitted to work. Rather, the restriction was that he was only entitled to work on his own account (whether as a sole trader, in partnership or through a limited company of which he was at least part owner) and he was not entitled to work as an employee. Accordingly, the petitioner was entitled to set up any business in any sector without reference to the respondent.

[26] The fundamental error of the Lord Ordinary when determining the case was to proceed upon the basis that there required to be a connection between the nature of the work that the petitioner had originally proposed to the respondent in his application for leave to remain as a Tier 1 Entrepreneur, and the work that he actually undertook. In the petitioner's case he set up a business and undertook work in the oil and gas sector. In addition, as he was entitled to do, he operated another business, "Prime Enterprises" which was designed to provide the petitioner's labour as a security guard, in particular to Search and Aberdeen Alarm. The petitioner was not an employee of either of these companies; the respondent should not have concluded that he was. When Search treated him as an employee the petitioner, appreciating that there had been no *consensus in idem* between them, terminated the relationship. He rendered invoices to Aberdeen Alarm. The Lord Ordinary had erred by addressing the question of whether the petitioner's work was connected to the activity that had resulted in him being granted leave to remain as an entrepreneur. The correct question was whether the petitioner had been employed by Search or Aberdeen Alarm. It was accepted that if the petitioner was held to have worked under a contract of employment then he would be in breach of the conditions of his leave but he was not prevented by these conditions from working as a self-employed contractor. Determining whether the petitioner was employed or self-employed required a consideration of all the evidence and it was for the respondent to provide reasons for her conclusion: *JO (Nigeria)* v *Secretary of State for the Home Department* [2016] CSOH 179 at paragraphs [47] to [52], it being borne in mind that if one concentrates only on factors adverse to the migrant's position, a distorted view is likely to emerge: *AH* v *Secretary of State for the Home Department* [2011] CSOH 7 at paragraph [33].

Respondent

[27] Mr McIver began by adopting his Note of Argument. It was the respondent's submission that the Lord Ordinary had not erred in law. He had found that the petitioner had been employed by Search, which finding on its own was sufficient to justify the decision under challenge. He had examined the petitioner's actual activity and the activity described in the business plan put forward as part of his application for leave to remain as a Tier 1 Entrepreneur, in the context of the petitioner's claim to still have been engaged in the latter, while recognising that an entrepreneur may choose to move into other activities. He properly recognised that the form of the employment relationship is not determinative as to whether genuine entrepreneurial activity had been undertaken. His decision was consistent with Outer House authority (*JO (Nigeria)*). The reclaiming motion should be refused.

[28] The purpose of a grant of leave to remain as a Tier 1 Entrepreneur was to allow the recipient to act as an entrepreneur. Entrepreneurship was a difficult concept to nail down by reference to a specific and comprehensive definition. Paragraph A41 of Annex A to the Policy Guidance looks to be as good an attempt as is possible. What was aimed at was genuine entrepreneurial activity. The context was immigration rather than the law of employment. Contrary to what Mr Caskie had submitted on behalf of the petitioner, a finding of self-employment would not trump everything else. This was to misunderstand the nature of the leave enjoyed by the petitioner. It was designed for entrepreneurs in order that they might act as entrepreneurs. It was not designed to allow recipients to access the labour market in order to work as security guards, provided that they formally structured their relationships so as to qualify for self-employment. In any event, on the basis of the documentation recovered by the immigration officers during the search of the petitioner's home on 10 September 2015, this was a case of *ex facie* employment by a business other than

that of the petitioner rather than of *ex facie* self-employment. That was apparent from, for example, the signed contract with Aberdeen Alarm. The petitioner had not offered a contrary explanation to the immigration officers and the *consensus in idem* point in relation to Search had been put forward on behalf of the petitioner only at a later date. The decision under challenge had been objectively justified.

[29] Should this be seen as a reasons challenge, as might be suggested by some of Mr Caskie's exchanges with the bench, what was required was no more than that it should be apparent to the informed reader why the decision was taken. Here the Notice of Curtailment made it clear that leave was curtailed because the petitioner had been found to have been working in a capacity not relating to the petitioner's business.

[30] Turning to the grounds of appeal, it was Mr McIver's submission that they began with a misapprehension on the part of the petitioner that the Lord Ordinary's decision was founded on the petitioner having gained leave to remain on the basis of undertaking to operate in one sector but having breached the conditions of leave by operating in another. That was not so. The Lord Ordinary's concern was with whether the petitioner had been engaged in employment as opposed to acting as an entrepreneur. The test that he had applied was whether the respondent had been entitled to find that the petitioner had been engaged in employment. He approached that question on his assessment of the available material and on that basis had concluded that the petitioner in working as a security guard had not been acting within the terms of his leave to remain. The key point for the Lord Ordinary was that the petitioner had been working for a business other than that which he had established, joined or taken over.

[31] What appeared in paragraphs 2, 3 and 4 of the grounds of appeal was premised on the supposition that the distinction between entrepreneurship and non-entrepreneurship

(and therefore what, on the one hand, is permitted by the terms of the petitioner's leave and what, on the other, is prohibited) depends entirely upon whether the recipient of leave is engaged in a working relationship which is, in form, one of employment (in the sense of being employed under a contract of employment or service). This is not the case. The form of the relationship is not determinative. This is apparent from consideration of paragraph A41 of Annex A to the Policy Guidance. However and in any event, the Lord Ordinary did find that the petitioner had been employed by Search and that the work carried out for Aberdeen Alarm was not for a business that he had established, joined or taken over.

Decision

[32] We take a certain amount to be uncontroversial. As at 10 September 2015 the petitioner's entitlement to remain in the United Kingdom depended on the respondent's grant of leave to remain, as expressed in her letter dated 6 January 2015. The letter has to be read together with the schedule and in the light of what the letter is a response to: the petitioner's application for leave to remain as a migrant under Tier 1 (Entrepreneur) of the Points Based System. For an understanding of what is envisaged by that, reference must be had to paragraphs 245D to 245F of the Immigrations Rules and the Policy Guidance (in their respective relevant versions). As provided by these documents, the petitioner's leave was subject to conditions and, harsh as this may appear, in the event of a breach of these conditions leave was subject to immediate curtailment with the result that the petitioner might be removed from the United Kingdom. As is explained by the Lord Ordinary, the basis for this is to be found in statute in terms of section 3(1) of the Immigration Act 1971

and section 10 of the Immigration and Asylum Act 1999, as amended; and in paragraphs 322 and 323 of the Immigration Rules.

[33] We take it equally to be uncontroversial that the power to remove a person from the United Kingdom on the basis of breach of the conditions of his leave to remain cannot be exercised arbitrarily and, accordingly, is subject to control by the court in exercise of its supervisory jurisdiction on the familiar grounds set out in *Wordie Property Co Ltd* v *Secretary of State for Scotland* 1984 SLT 345 at 348.

[34] With that by way of setting out common ground, we turn to the two propositions which encapsulate what the petitioner submits were material errors on the part of the Lord Ordinary and which vitiated his decision to refuse the prayer of the petition.

[35] The first proposition is that the Lord Ordinary had erred in proceeding on the basis that in order for the petitioner to comply with the conditions of his leave to remain, there required to be a connection between the nature of the work that the petitioner had originally proposed to the respondent in his application for leave to remain as a Tier 1 Entrepreneur, and the work that he actually undertook while residing in the United Kingdom by virtue of the leave to remain. Notwithstanding the fact that the petitioner, as an applicant for leave, had submitted a business plan which envisaged him working as an engineer in the oil and gas sector, we accept that it was not a condition of his leave that the petitioner could only work in that capacity and in that sector. We do not accept that the Lord Ordinary thought otherwise. At paragraph [1] of his Opinion he notes that the terms of petitioner's leave to remain were set out in the respondent's Letter of 6 January 2015 and its schedule where it is stated that employment is forbidden except "where you are working for the business which you have established, joined or taken over". However:

> "There is no indication that the business must be in the same sector as the business which it was proposed should be established as part of the person's application to remain. The letter permits employment in any business which the petitioner may establish."

What appears later in the Lord Ordinary's Opinion is consistent with how he had introduced it at paragraph [1]. As the respondent submitted, the overall concern of the Lord Ordinary was a consideration as to whether the petitioner had been engaged in employment as opposed to acting as an entrepreneur. At paragraph [6] of the Opinion (page 31 of the Reclaiming Print), having previously noted that the only business the petitioner had claimed to have established, joined or taken over was Omega, the Lord Ordinary returns to the terms of the petitioner's leave:

> "The permission letter loosens the restrictions of the Policy Guidance slightly by acknowledging that a person may branch out into other forms of business after receiving permission to remain. Nevertheless the business must be one that the petitioner has 'established, joined or taken over'. In my opinion in taking up employment with Search Consultancy the petitioner took employment outside the scope of his permission."

Again, at paragraph [7] of the Lord Ordinary's Opinion (page 32 of the Reclaiming Print):

> "The underlying requirement is that the work must be for the business the entrepreneur has established. Thus where the entrepreneur has branched out into another business … Provided the justification for granting leave to remain applies to the new business venture as it did to the original business venture there is no breach of the conditions of leave … The key is whether the work being done whether as an employee or a self-employed independent contractor is for the benefit of a business that the petitioner has 'established, joined or taken over.'"

At paragraph [8] of his Opinion the Lord Ordinary gives the fact that the petitioner was working for another business than his own as his reason for holding that the respondent was entitled to curtail the petitioner's leave to remain. His decision had nothing to do with the particular sector in which the petitioner was working or indeed the particular business for which he worked, other than that neither Search not Aberdeen Alarm was a business which

the petitioner had established, joined or taken over. As the Lord Ordinary explains his decision at paragraph [12] of his Opinion:

> "The petitioner took employment with a business he had not started up or taken over. In these circumstances the [respondent was] entitled to take the view that the petitioner was supplementing his income from [Omega] with casual labour in the security sector."

We therefore must reject the petitioner's first proposition.

[36] The petitioner's second proposition is that the Lord Ordinary had failed to ask the correct question which was whether the petitioner had been employed by Search or Aberdeen. Both in his grounds of appeal and his note of argument the petitioner draws attention to what was said by the Lord Ordinary at paragraph [8] of his Opinion as illustrating his error. It is convenient to quote that paragraph in full:

> "[8] The respondent in submission expressed doubts as to whether the invoices truly reflected the petitioner's employment status with Aberdeen Alarm Company Ltd. But that is not a matter I require to explore. In my opinion the [respondent was] entitled to conclude that the work the petitioner was performing for Search Consultancy and Aberdeen Alarm Company Ltd was work 'for another business'. I therefore conclude that the decision maker did not err in curtailing leave to remain."

The petitioner focuses attention on the sentence: "But that is not a matter I require to explore" following, as it does, a reference to the petitioner's employment status. As Mr Caskie was to emphasise in the course of his oral submissions, that, on the petitioner's approach, was the only matter that the Lord Ordinary required to explore. That was because, again on the petitioner's approach, the form of any employment relationship to which the petitioner was party was determinative. If the petitioner was found to be employed under a contract of employment or service then he would be in breach of his leave to remain but if, on the other hand, he was found to be self-employed in the sense of being engaged under a contract for services, even if these services were simply the provision of

labour, then the petitioner would not be in breach. Accordingly, by refusing to explore the true nature of the petitioner's employment status the Lord Ordinary had erred.

[37] We disagree. In our opinion, the Lord Ordinary's approach was correct.

[38] A variety of important rights are available under statute to persons who are "employees" or "workers" which are not available to those who work on their own account and can therefore be described as "self-employed". The distinction is also of significance in relation to tax and social security. As a result, how the distinction is to be made in a particular instance as between employment and self-employment has generated a large body of case-law. As Lord Ericht observed in *JO (Nigeria)* at paragraph [49], the question of whether a worker is employed under a contract of service can be a complex one and turns very much on the circumstances of the particular case. *Pimlico Plumbers Ltd* v *Smith* [2018] ICR 1511, which was referred to incidentally in the course of argument, is only one in a long list of authorities bearing on the issue. A large number of factors may have to be taken into account in analysing a particular arrangement; form is not irrelevant but will generally be found to have to yield to substance (see eg *Selwyn's Law of Employment* (20th edit, 2018) paragraph 2.57 and cases cited there). It is such a process of analysis that Mr Caskie submitted the respondent should have carried out before concluding that the petitioner had been employed by Aberdeen Alarm and therefore in breach of his conditions of leave (Mr Caskie had a slightly different position in relation to Search, to which we will return). The Lord Ordinary, on the other hand, saw that as unnecessary.

[39] We are of the same opinion as the Lord Ordinary. It would seem to be clear that the objective of the policy which finds expression in the Policy Guidance is the generation of economic activity in the United Kingdom by attracting or retaining foreign entrepreneurs who are willing to apply their entrepreneurial talents and capital in a business or businesses

which they have established, joined or taken over. As appears from paragraph A41 of Annex A to the Policy Guidance, a condition of a grant of leave to remain under the entrepreneurial sub-tier which was created to give effect to this policy, is the requirement that recipients are prohibited from "engaging in employment". The wording in the letter granting the petitioner leave to remain is: "you are not permitted to undertake employment". Stopping there, we observe that there is nothing to restrict the prohibition to employment under what, on a proper analysis, falls to be regarded as a contract of service. However, the nature of the prohibition becomes clearer when ones goes on, both in the text of the Letter and in the text of paragraph A41 of Annex A. The Letter excludes from the prohibition "working for the business(es) you are establishing, joining or taking over". That is to equate "employment" with "working for". It also draws a line between working for, on the one hand, the business(es) you are establishing, joining or taking over, which is permissible (as would have to be the case, whether the entrepreneur was operating his enterprise as a sole trader, in partnership or as a registered company) which is not prohibited; and working for some other business, which is prohibited. Paragraph A41 of Annex A provides explanations of what may not be considered to be "working for your own business" and concludes; "If your work amounts to no more than employment by another business, we may consider you to be working in breach of your conditions of stay …" Thus, the Lord Ordinary was absolutely correct, having considered the available material as he had been invited to do, to apply his mind to the question of whether the respondent was entitled to conclude that the work that the petitioner had admittedly been doing for Search and Aberdeen Alarm was work for "another business", in the sense of an enterprise other than one which the petitioner had established, joined or taken over.

[40] Our finding that the Lord Ordinary made no error is sufficient to dispose of this reclaiming motion which will be refused. We would observe, however, that had the reclaiming motion to be determined by reference to whether the respondent was entitled to conclude that the petitioner's work for Search and Aberdeen Alarm was carried out in terms of a contract of employment, which is how the petitioner had identified the issue in his application for judicial review, we would also have been of the view that it would have to be refused. The respondent had before her un-contradicted documentary evidence to the effect that the petitioner had been working for Search. It was neither averred nor claimed in submission that the petitioner had provided a contemporary explanation that there had been no *consensus in idem* as to the nature of the contract with Search which was evidenced by pay slips, the termination letter and a P45 form. As far as Aberdeen Alarm was concerned there was a written contract of employment. That the petitioner had apparently issued invoices in the name of Prime Enterprises (which was no more than a name) was a very fragile basis for the reality being other than what appeared from the terms of the written contract of employment. The respondent was entitled to give them very little weight.