



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/13700/2014

THE IMMIGRATION ACTS

Heard at Field House
On 14th April 2015

Determination Promulgated
On 20th April 2015

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS ELISABETH JEFFRIES
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:

For the Appellant: Ms J Isherwood, Home Office Presenting Officer
For the Respondent: Ms M Rhind, of Immigration Law LLP

DECISION AND REASONS

Introduction

1. This is an appeal by the Secretary of State but I will refer to the parties as they were before the First-tier Tribunal.
2. The appellant is a citizen of Australia born on 13th March 1982. She arrived in the UK on 20th September 2010 as a Tier 4 student migrant and had leave in that capacity until 26th January 2012. She was then granted leave as a Tier 1 post-study work migrant until 9th February 2014. On 4th February 2014 she applied for leave

to remain as a Tier 2 migrant. This application was refused on 4th March 2014 as she was not awarded the relevant points under Appendix A for her salary. She was granted all other points under Appendix A, and full points under Appendices B and C. Her appeal against the refusal decision was allowed by First-tier Tribunal Judge Emerton in a determination promulgated on the 17th December 2014.

3. Permission to appeal was granted by Judge of the First-tier Tribunal Shimmin on the 2nd February 2015 on the basis that it was arguable that the First-tier judge had erred in law in relying upon evidence beyond that which is permitted by s.85A of the Nationality, Immigration and Asylum Act 2002 as he accepted oral evidence that the appellant worked only 39 hours a week for her stated wage and not 45 as assumed by the Secretary of State in the refusal letter and as evidenced by the documents submitted with her application.
4. The matter came before me to determine whether the First-tier Tribunal had erred in law

Submissions

5. I asked Ms Isherwood to clarify whether it was accepted by the Secretary of State that the conclusion at paragraph 22 of the determination was correct and thus that if this appeal succeeded the Secretary of State accepted that the decision would be that appeal was allowed to the extent that the decision was found not to be in accordance with the law and should be remitted to the Secretary of State. She said that this would be the correct course.
6. Ms Isherwood relied upon the grounds of appeal. I said that I thought I was with her, and that it was therefore best to hear from Ms Rhind to see if there were further issues which needed to be explored.
7. Ms Rhind explained that she accepted that the First-tier Tribunal could not take oral or other evidence into account that had not been before the Secretary of State with the application. She also accepted that there had been no document submitted with the application before the Secretary of State which showed the appellant worked a 39 hour week for her basic wage, and thus earned a sufficient high salary to qualify under Appendix A on this basis. She argued however that it had been open to the Secretary of State to assume that this was the case given the framework of the application at Appendix J.
8. I informed the parties that I found the First-tier Tribunal had erred in law, but that I would set out my full reasons in writing. Ms Rhind asked that I urge the Secretary of State to reconsider this matter and issue a new decision as soon as possible as the appellant had been waiting for over a year. I trust that the Secretary of State will reconsider the matter with full evidence (which I assume is now before her but if not must be submitted immediately by the appellant) regarding the appellant's salary promptly.

Conclusions

9. In accordance with s.85A of the Nationality, Immigration and Asylum Act the evidence in a “points based system” appeal of this type is limited to that submitted in support of and at the time of making of the application.
10. The only way in which Judge Emerton could have understood that the appellant’s basic salary of £26,150 was for a 39 hour week and not the 45 hour week set out on the COS was from the oral evidence (supported by other documents not submitted with the application) of the appellant. He thus erred in law in allowing the appeal outright under the Immigration Rules as this evidence was not admissible.
11. However Judge Emerton correctly found that the information collected by the Secretary of State was ambiguous. Whilst the various documents and forms made it clear her average working week was 45 hours and her basic pay £26,150 it was not right or logical to conclude that this was the pay for that number of hours. The appellant had provided all the information requested by the Secretary of State and done so accurately. The Secretary of State had not however posed the right questions to obtain the information on the amount of pay this appellant would receive for a 39 hour week. She thus did not have the information needed to calculate the salary rate under Appendix J of the Immigration Rules.
12. In accordance with Naveed (Student fairness – notice of points) [2012] UKUT 14 fairness required that the Secretary of State seek further clarification of the information before her rather than refuse the application given that the information before her meant it was possible the appellant met the Immigration Rules and in the context of the appellant having supplied the documents requested and having completed her application form in full.

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 to the extent that it is allowed as not in accordance with the law and remitted to the Secretary of State for a lawful decision based on full information regarding the appellant’s rate of pay for a 39 hour week.

Signed:
Upper Tribunal Judge Lindsley

Date: 13th April 2015

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 a full fee award as this was the decision of the First-tier Tribunal and there were no further submissions on the issue by either party and of course the appellant was entitled to a lawful decision, and no evidence which was not before the Secretary of State has been taken into account in coming to my decision to allow the appeal.

Signed:
Upper Tribunal Judge Lindsley

Date: 13th April 2015