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Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/01820/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1 November 2018	**On 14 November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

KAZI ZIBRIL MOSTAFA FARHAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Z Nasim, Counsel
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant had leave to remain as a Tier 4 (General) Student Migrant from 3 October 2013 until 30 January 2017. On 18 January 2017 he made a human rights application as the partner of a person present and settled in the UK, namely Ms Rabeya Bashori Begum. His application was refused on 18 January 2017 for reasons which can be summarised as follows. The appellant had previously been granted leave to remain under paragraph 245ZY(c) of the Immigration Rules, which imposed a restriction on employment. The appellant had submitted six payslips suggesting he

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was in self-employment as a director of Nice Lounge Ltd, t/a Curry Stop Restaurant. Paragraph 6 of the Immigration Rules defined "self-employed" for the purposes of Part 6A of the rules as meaning "registered as self-employed with HM Revenue & Customs, or is employed by a company of which the applicant is a controlling shareholder". The appellant was registered as a director of the company until its dissolution. This placed him in breach of the conditions of his leave and his application was therefore refused by reference to paragraph E-LTR.2.2(b) of Appendix FM of the Immigration Rules[1].

2. The decision noted the appellant did not meet the requirements of paragraph R-LTRP.1.1(c)(ii), which states that an applicant must not fall for refusal under any of the suitability grounds. The respondent therefore considered whether the appellant could succeed by reference to paragraph EX.1(b). However, the appellant had not shown there were insurmountable obstacles to family life with his partner continuing outside the UK. Nor had he shown there were any significant obstacles to his reintegration in Bangladesh so as to satisfy paragraph 276ADE(1)(vi) of the rules. His application did not give rise to any exceptional circumstances to warrant the grant of leave outside the rules.

3. The appellant appealed to the First-tier Tribunal. The grounds criticised the respondent's finding about the appellant's self-employment. The appellant would say that he had not knowingly undertaken any self-employed work and he was never served with a notice containing a condition explaining that he was not allowed to undertake self-employment.

4. The appeal was heard by Judge of the First-tier Tribunal Devittie on 13 April 2018 and dismissed in a decision promulgated on 23 May 2018. At the hearing the appellant accepted that he was a director of the company but denied having any financial interest in the business, having not invested any money in it. His appointment as a director was essentially nominal. In any event, he was not aware that he was prohibited from taking self-employment.

5. In support of his arguments, the appellant relied on the decision in *Muhammad Haseeb Anwar v SSHD* [2017] EWCA Civ 2134. In that case, the court considered the question of whether the appellant had breached a condition of leave by studying at a college in addition to the one which had assigned his CAS. The court noted the power contained in section 4(1) of the Immigration Act 1971 to grant leave subject to conditions provided that those powers shall be exercised by notice in writing. Such a condition must be communicated clearly because of the serious consequences of a breach. The Immigration Rules do not of themselves impose conditions. In the circumstances of that case, the necessary notice had not been given and, as a

[1] E-LTRP.2.2. The applicant must not be in the UK-
(a) … or
(b) in breach of immigration laws (except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded), unless paragraph EX.1. applies.

consequence, the appellant had not been made subject of the intended condition. It followed there had been no breach of conditions.

6. Judge Devittie distinguished the facts of this appeal. In short, he considered that it was administratively unduly onerous to expect the respondent to include the full provisions of the Immigration Rules restricting employment in the notice given to the appellant. He also considered that the condition recorded on his Biometric Residence Permit, expressed as "Work 20 hours maximum in term time", was sufficiently clear to exclude self-employment. He considered this was "abundantly clear". He found therefore that the appellant had breached the 20-hour limit on work during term time and the appellant did not meet all the eligibility requirements of Appendix FM. He noted in conclusion that the appellant had not set out any basis in his evidence for challenging the decision that there were no insurmountable obstacles to the continuance of married life outside the UK. He purported to dismiss the appeal under the Immigration Rules and on human rights grounds.

7. The appellant sought permission to appeal on three grounds. Firstly, the grounds argued that the judge had failed to take into account the principles set out in *Anwar*. The court had rejected the notion that the provisions of the Immigration Rules of themselves imposed a condition restricting a person's place of study and held that a further administrative act was required to give notice. In this appeal the judge had failed to take into account the appellant's evidence that he was aware that he was not allowed to work more than 20 hours per week and he denied doing so. Secondly, the respondent had treated the relevant suitability provision as if it were mandatory, whereas it is a discretionary provision. Thirdly, the judge had purported to dismiss the appeal under the Immigration Rules but he no longer had jurisdiction to do so.

8. Permission to appeal was granted by the First-tier Tribunal in respect of the third ground only. The respondent lodged a rule 24 response to the decision of the First-tier Tribunal on the third ground, opposing the appeal. The appellant renewed his application for permission to appeal on the first and second grounds. The Upper Tribunal granted permission to argue the first ground but not the second ground. In relation to the first ground Upper Tribunal Judge Jackson said,

> "It is arguable that the First-tier Tribunal erred in law on the first ground in finding that there was an implied condition on the Appellant's leave, because to include the full provisions of the Immigration Rules being an unduly onerous administrative burden and that the condition 'Work 20 hours maximum in term time' was sufficiently clear to exclude self-employment. That is arguably contrary to the decision in Anwar."

9. I heard submissions from the representatives as to whether the decision of Judge Devittie contains a material error of law.

10. Mr Nasim did not pursue the third ground after I indicated that I did not think the judge's reference at the end of his decision to having dismissed the appeal under the rules could give rise to a material error. He had also made it clear that he had dismissed the appeal on human rights grounds. Mr Nasim pointed out that Judge of the First-tier Tribunal Lambert had granted permission in relation to the third ground in the following terms:

> "While he also dismissed the appeal on human rights grounds there is no reasoning in the decision under Article 8."

11. He suggested this would entitle the appellant to argue that the judge's finding that there were no insurmountable obstacles to family life continuing in Bangladesh was inadequately reasoned. However, I indicated that was not the case. The third ground as argued in the application for permission to appeal was to the effect that the judge had not had jurisdiction to dismiss the appeal under the rules in a human rights appeal. I noted in any event that the appellant said nothing at all in his statement regarding the point about whether family life could be continued in Bangladesh. His statement was solely concerned with the issue of self-employment/employment.

12. This appeal turns on the first ground. If it is found that the appellant did not breach a condition of his leave as a student, there are no further challenges to his case that he satisfies the rules for leave to remain under the five-year partner route.

13. I shall set out what Judge Devittie had to say about the *Anwar* point. He wrote:

> "11. I recognise as binding the principle of law enunciated in the case of Anwar, namely, that for there to be an operative condition which restricts the terms of a residence permit, such a condition must be communicated clearly to the person affected in the individual case. Applying this principle to the facts of this case, in order to be compliant with the law the appellant's residence permit needed to make clear that self-employment was not permitted. In my opinion the biometric and residence permit issued to the appellant does with sufficient clarity, make it known to the appellant that self-employment is not permitted. I say so for the following reasons:
>
> (1) It would in my opinion impose an unduly onerous administrative burden on the respondent to apply a literal interpretation of the requirements to communicate to the individual concerned the conditions … subject to which a permit is granted. The efficient administration [of] immigration controls would seem to require the respondent to communicate with sufficient clarity the conditions of the permit and not to spell out in the permit the detailed provisions of the immigration rules.
>
> (2) In the instant case the applicable immigration provisions provide as follows: [*the rules are set out*].
>
> (3) It surely cannot be the case that the respondent was required in order to comply with the law to set out in full in the biometric permit the above provisions? The context is important - the application is initiated by an applicant and/or his legal representatives in order to meet the requirements of a specific.
>
> (4) The restrictive condition imposed on employment in the present case as inscribed on the biometric residence permit reads: "WORK 20 HOURS MAXIMUM IN TERM TIME".
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> It is clearly to be implied in the above condition, that what is contemplated is anything other than self-employment and that self-employment is not permitted. I am not certain what more was to be reasonably expected of the respondent in order to inform the

> appellant that self-employment was not permitted? It seems to me to be abundantly clear, from the fact that work was restricted to 20 hours in term time, that no other form [of] employment was permitted. It seems pretty obvious too that no such restriction applies during the vacation.
>
> (5) Establishing a business venture in the way this appellant has done, must of necessity contravene the 20 hour limit on work during term time. In the case of an independent employer, the respondent is able to verify the number of hours worked by checking with an employer whether a breach of the conditions of the permit has occurred. If the appellant's argument that he did not breach the 20 hour limit is to exonerate him then it would mean that respondent would have to accept without question a person's word that he has complied with the conditions of his permit, in the course of running his business enterprise. This underlines my point - it is clear from the imposition of a 20 hour limit that self-employment is prohibited. In the circumstances the appellant's claim that he did not breach the 20 hour limit takes his case no further. In any event he has no way of proving the hours he devoted to his business, and what is more his evidence on how he was distanced from any personal financial interest in the business is highly improbable and he has not called his brother-in-law to give evidence on this point."

14. Mr Nasim relied on his written grounds. He took issue with the judge's decision that the endorsement on the appellant's biometric residence permit could be interpreted to mean that self-employment was prohibited, although he acknowledged that paragraph 6 of the Immigration Rules contains a definition of 'employment' which includes self-employment. He said the facts were that the appellant was an employee and not self-employed. He worked as a waiter in his brother-in-law's restaurant and had no control over the company. The respondent had only treated him as self-employed because he was a director.

15. Mr Nasim also took issue with the judge's inference that the appellant had worked more than 20 hours given that this had not been challenged by the respondent. The appellant had produced his payslips and bank statements and there was nothing in the evidence to suggest that he had worked more than 20 hours per week. He also took me to the application form in which the appellant had set out details of his employment.

16. Mr Melvin argued that the judge was right to distinguish the current case from the decision in *Anwar*. The court was looking at a requirement not to study at another college in addition to the one which had assigned a CAS. In any event, the judge had been right to find that the endorsement on the biometric residence permit amounted to a sufficiently clear communication of the condition attached to the appellant's leave. The appellant was registered as a director and it had been open to the judge to decide that the appellant was self-employed and therefore in breach of the condition. He pointed out that the appellant's brother-in-law had not been called to give evidence to clarify the circumstances.

17. I reserved my decision as to whether the judge made a material error of law in approaching the matter as he did. Having considered the matter carefully, I have concluded that the decision must be set aside because it contains a material error of law. My reasons are as follows.

18. I start by noting that the appellant asserts that he was an employee, as opposed to self-employed. In his FLR(M) application form the appellant indicated that he met the financial requirement of the rules through his income from *salaried employment*. He said he had been employed as a waiter since January 2016 Nice Lounge Ltd, t/a Curry Stop Restaurant. He said his annual income was £7488.24. He did not complete the section of the form regarding self-employment. At the end of the form he mentioned that his employer had paid him irregularly. He submitted his payslips from July through to December 2016 which showed a monthly salary of £624. The payment method is stated to be BACS. His Santander bank statements do not reflect all these payments, although there are some transfers from Nice Lounge Ltd for smaller sums.

19. The respondent's bundle contains a search result from Companies House showing the appellant was a director of the company. The respondent approached the matter in the following way. It was noted that paragraph 245ZY(c)(iii) restricted the employment which may be taken by a Tier 4 student. The only exception which could apply to this appellant was permission to take employment during term time of no more than 20 hours per week and employment during vacations. Reference was then made to the definition of 'self-employed' applicable to Part 6A of the rules. Under this definition it means "*an applicant is registered as self-employed with HM Revenue & Customs, or is employed by a company of which the applicant is a controlling shareholder*". The letter noted that the appellant registered as a director of Nice Lounge Ltd and was therefore considered to be in breach of the conditions of his leave.

20. When it came to the appeal, the appellant strenuously denied undertaking any self-employed work and, in any event, maintained that he had never been served with notice of any condition attached to his leave that prevented him from undertaking self-employment. In his witness statement, he accepted he was the director of the company but said this was in name only. He had no financial interest in the business and had not invested any money in it. He just did a favour to his brother-in-law. He was aware that, as a student, he was only permitted to work 20 hours per week. He had observed that condition.

21. I pause to note that the evidence before the respondent, and indeed before the First-tier Tribunal, did not evidence either that the appellant was recorded as being self-employed with HMRC or that he was a controlling shareholder in the company. In my judgement, this is a significant oversight. The respondent has purported to rely on the definition of 'self-employed' contained in the rules but has not shown that the definition has been met. Instead, the respondent inferred from the fact the appellant was registered as a director that he was self-employed. Of course, most directors would be self-employed but not necessarily. It is perfectly plausible that, particularly within a family business such as this, that a person could in reality work as an

employee whilst his name appeared in the register at Companies House as a director. Therefore, the factual premise underlying the finding that the appellant breached a condition of his leave has not been established. This point does not appear to have been argued before the First-tier Tribunal and it was not argued before me.

22. The challenge to the judge's decision can be divided into two parts: (1) was the judge right to distinguish *Anwar*?, and (2) was the judge right to consider that the endorsement on the appellant's biometric residence card was sufficiently clear to inform him that he was not permitted to become self-employed?

23. I return to the *Anwar* decision and note the following. The court was concerned with the interpretation of section 3(1)(c) of the Immigration Act 1971. Singh LJ emphasised the fundamental constitutional principle that a state must accord to individuals the right to know of a decision before their rights can be adversely affected. Fairness is the guiding principle of public law and elementary fairness supports the principle that a decision takes effect only upon communication. In interpreting section 4(1) of the 1971 Act, Singh LJ considered that it was clear that notice in writing must be given to the person affected. The mere publication of the Immigration Rules does not constitute the giving of notice to the person affected. He also considered that the requirement that the individual be given notice in writing is not unduly onerous for the Secretary of State to comply with. It could be easily done and would be consistent with good administration. In a concurring judgment, Peter Jackson LJ said that it was important that those who are subject to decisions regulating the grant of leave to remain should be made unmistakably aware of what they can and cannot do. This imposes no unreasonable demands upon the Secretary of State.

24. The ratio of *Anwar* can be read narrowly as follows: for there to be an operative condition restricting a person's study to one particular institution, that condition must be communicated clearly to the person affected. However, the principle relied on in that case clearly has broader application and must be considered to apply to other conditions affecting a person's leave. I can see no rational basis on which to distinguish the two cases on the issue of the "unduly onerous administrative burden" on the respondent, as the judge in this case put it. If it was a modest requirement to require Secretary of State to inform a student that he or she could not study at another institution, then it would similarly be no more than a modest requirement to require him to communicate the restriction on self-employment. I find the judge erred by departing from *Anwar*.

25. However, for that error to be material, the judge must also have been wrong to consider that the endorsement on the appellant's biometric residence permit was insufficiently clear to communicate the restriction on self-employment. The appellant accepts that he knew he was not permitted to work more than 20 hours per week during term time and he asserts he consciously complied with that condition. His point is that he was not to know he was also not permitted to work on a self-employed basis, even though he denies that he was anything more than a mere employee. The judge felt it was "abundantly clear" that the endorsement restricted both employment and self-employment.

26. I have some sympathy for the judge's position. It would be a curious outcome for a student to understand, as a result of that endorsement, he was not permitted to work more than 20 hours as an employee but he could do so on a self-employed basis. However, the background to the court's reasoning in *Anwar* was that clarity of communication is required, in part because of the significant consequences of a breach. It follows that the duty to provide clear communication of any condition affecting the individual's leave would require the restriction on self-employment to be expressly explained to students.

27. Even if I am wrong about that, I would find that the judge was not entitled on the evidence to infer that the appellant had breached the condition by working excessive hours. He seems to infer from the fact the appellant was self-employed that he must have been devoting much more of his time to the business. However, as explained above, there was nothing in the evidence submitted with the application to suggest this was the case. There was no evidence, for example, showing the appellant failed or abandoned his course. The respondent's decision to regard the appellant as self-employed was based solely on the fact he was registered as a director. The respondent did not allege the appellant had worked more than 20 hours and therefore the appellant was not on notice of the need to prove this.

28. The decision of Judge Devittie contains material errors of law and is set aside. None of the substantive requirements of the rules for partners are in dispute. The appellant has met the requirements of Appendix FM and nothing has been raised to suggest there is public interest in refusing him leave now that the suitability issue has been resolved in his favour. The decision is disproportionate and I therefore substitute a decision allowing the appellant's appeal on human rights grounds.

Notice of Decision

The Judge of the First-tier Tribunal made a material error of law and his decision dismissing the appeal is set aside. The following decision is substituted:

The appellant's appeal is allowed on human rights grounds (article 8).

No anonymity direction is made.

Signed Date 5 November 2018

Deputy Upper Tribunal Judge Froom