



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/48883/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 7 October 2015**

**Decision & Reasons Promulgated  
On 9 October 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE GRIMES**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**EKEMINI ROSELINE EKPENYONG**

Respondent

**Representation:**

For the Appellant: Ms A Fijiwala, Home Office Presenting Officer

For the Respondent: Mr A Adeolu, Moorehouse solicitors

**DETERMINATION AND REASONS**

1. Although this is an appeal by the Secretary of State I will refer to the parties as they were in the First-tier Tribunal.
2. The appellant, a citizen of Nigeria, appealed to the First-tier Tribunal against a decision of the Secretary of State dated 20 November 2014 to refuse her application for leave to remain in the UK as a domestic worker under paragraph 159EA of the Immigration Rules. First-tier Tribunal Judge M R Oliver allowed the appeal. The Secretary of State appeals with permission to this Tribunal.

3. The background to this appeal is not in dispute. The appellant entered the UK on 22 October 2011 with leave as a domestic worker. Her leave was extended, on the last occasion until 21 August 2014. On 9 October 2013 she left her employment with the employer with whom she had come to the UK. She found new employment as a domestic worker and commenced that employment on 9 June 2014. She applied for an extension of leave to remain on 22 July 2014. The respondent refused that application under paragraph 159EA (ii) of the Rules on the basis that the appellant had not been employed in the UK as a domestic worker between 9 October 2013 and 9 June 2014 and therefore could not demonstrate that she had continued to be employed for the duration of leave granted as a domestic worker in a private household as required by paragraph 159EA (ii).
  
4. The First-tier Tribunal Judge heard oral evidence and correctly identified the issue to be determined at paragraph 7 of the determination where he said; *'The appeals [sic] turns on the meaning of "has continued to be employed for the duration of leave granted as a domestic worker in a private household in paragraph 159EA of the rules.'* The Judge went on to say that there clearly could be gaps between employers *'of short duration'* which would not interrupt continuity of employment. The Judge then said; *'Here, however, the interruption is at least 8 months'*. The Judge went on to make negative findings about the appellant including the fact that he had not been told how the appellant maintained herself during the 8 month period; there was no evidence as to how difficult it would have been for the appellant to find other domestic work; he doubted the appellant's claim that she had left her previous employer because she was treated like a slave given that she had been working for her for 8 years; he found it difficult to accept the appellant's claim that she was unaware of how to contact the Home Office given the ease with which she did so when she found further employment; the appellant failed to inform the Home Office of the end of her employment with her first employer until she made an application for an extension; and, although she says that her new employment began on 9 June 2014, the contract is dated the day before the application for an extension. Having made all of these findings the Judge concluded at paragraph 8;  

"In the absence of evidence that she did any positive act in breach of her leave I find, with some reluctance, that she has satisfied the requirement of continuity."
  
5. In the grounds of appeal it is submitted on behalf of the Secretary of State that the conclusion lacks reasoning or is perverse. Ms Fijiwala submitted that the Judge applied the wrong test in paragraph 8 in that there does not need to be evidence of a positive act in breach of the appellant's leave. She submitted that the issue is whether the appellant has shown continuous employment as a domestic worker. She submitted that the Judge made clear findings that there was a gap of 8 months which is more than a short gap. She submitted that the Judge should have dismissed the appeal in light of his findings at paragraph 7.

6. Mr Adeolu submitted that the Judge had no guidance as to the interpretation of '*continued to be employed*' in paragraph 159EA (ii). He submitted that there is no definition within the Rules or in guidance or case law. He submitted that breaks are permitted in continuity of employment under the provisions for Tier 2 work permits where periods of 28 or 60 days are permitted to seek alternative employment and that absences of 6 months are not counted in determining continuity of residence in relation to indefinite leave to remain. He submitted that in the absence of guidance in the Rules or in policy or case law the Judge had a discretion based on the facts of the case and his judgement and that he was entitled to exercise that discretion in the appellant's favour. He submitted that some of the concerns set out by the Judge in paragraph 7 are not relevant and some were based on a lack of evidence.
7. Ms Fijiwala accepted that there is no guidance as to what constitutes continuity of employment under paragraph 159EA (ii). She also accepted that there can be gaps between employers of short duration, as stated by the Judge. However she submitted that, for the reasons given in the determination, the Judge in this case was clearly not satisfied with the gap in this case. She submitted that, having made the findings he went on to ask himself the wrong question, that is whether the appellant had done '*any positive act*' in breach of her leave. The question should have been whether the appellant had been continuously employed. She submitted that the Judge had erred in failing to apply the law to his findings of fact.

#### Error of Law

8. I am satisfied that the First-tier Tribunal Judge did make a material error of law. Having made findings and expressed concerns as to the duration of the gap in employment the Judge went on to allow the appeal on the ground that there was no evidence that the appellant '*did any positive act in breach of her leave*'. In my view it is not clear what this means. Paragraph 159EA (ii) requires the Judge to be satisfied that the appellant '*has continued to be employed for the duration of leave granted as a domestic worker in a private household*'. The Judge did not make a properly reasoned finding as to this issue and therefore failed to apply the law to the facts found. To that extent the Judge erred in law.
9. Mr Adeolu asked that I remit the appeal to the First-tier Tribunal in the interests of justice as the appellant needs to submit further evidence. However the Secretary of State did not challenge the Judge's findings of fact and there was no cross appeal by the appellant challenging these findings. Further, the appellant did not submit any further evidence for consideration should the Upper Tribunal remake the decision. In these circumstances I considered that it is not appropriate to remit the appeal to the First-tier Tribunal. Instead I indicated that I would remake the decision myself. As there was no challenge to the findings of fact I preserve them and remake the decision on the basis of the findings of fact made by the First-tier Tribunal Judge.

### Remaking the decision

10. Mr Adeolu submitted that it would be open to me to decide that 8 months is not a long enough gap to break continuity of employment. Ms Fijiwala submitted that the First-tier Tribunal Judge found that 8 months is not a short gap and that this finding has not been challenged.
11. It is not in dispute that the appellant was not employed as a domestic worker between 9 October 2013 and 9 June 2014, a period of 8 months. I note that there is no guidance as to the interpretation of paragraph 159EA (ii). I therefore give the provision its ordinary meaning. I accept Ms Fijiwala's submission and the Judge's opinion that gaps between employers of short duration would not interrupt continuity of employment. However in my view a gap between employers of 8 months is not one of short duration. The First-tier Tribunal Judge did not accept the explanation put forward for the appellant leaving her previous employment and noted the lack of evidence around the appellant's efforts to secure alternative employment. In these circumstances I find that the appellant has not shown that she continued to be employed for the duration of leave granted as a domestic worker in light of the gap of 8 months between employers. Accordingly the appellant has not discharged the burden upon her to establish that she meets the requirements of the Rules.
12. The First-tier Tribunal Judge did not consider the appeal under any other provisions of the Rules or under Article 8 of the European Convention on Human Rights and no challenge was made to his failure to do so. No evidence was put to me in relation to the appellant's private life and no submissions were made. There is nothing before me to show that the appellant can meet the requirements of paragraph 276ADE of the Rules. There is nothing to indicate that there is anything in the appellant's case which would require consideration outside the Rules.

### **Conclusion**

13. The making of the decision of the First-tier Tribunal did involve the making of a material error on a point of law.
14. I set the decision aside and remake it by dismissing the appeal against the decision of the Secretary of State under the Immigration Rules.

Signed

Date: 7 October 2015

Deputy Upper Tribunal Judge Grimes