OUTER HOUSE, COURT OF SESSION

[2017] CSOH 107

P1052/15

OPINION OF LORD SUMMERS

In the petition of

OKO O-ONO

Petitioner

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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

9 August 2017

[1] The petitioner is Oko O Ono. He is a Nigerian national and a qualified engineer. He holds a BSc in Geology and Mining and an MSc in Petroleum Engineering. Having studied for these degrees in the UK, he applied for permission to remain and was granted leave until 6 January 2018. The grant of leave is set out in a letter of 6 January 2015 ("the Letter"). Leave was permitted under the provisions made for entrepreneurs who wish to establish businesses in the UK. The Letter includes a schedule which provides that the petitioner is not permitted to "undertake employment other than working for the business(es) you are establishing, joining or taking over". This wording follows the wording of the Tier 1 (Entrepreneur) Policy Guidance which states that employment is forbidden except "where

you are working for the business which you have established, joined or taken over". There is a minor variation on the wording of the Policy in that the Letter does not confine the permission to remain to employment with a single business and acknowledges that in some situations the entrepreneur may start up other businesses in addition to or in substitution for the original business. 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.

[2] The Secretary of State for the Home Department 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". The petitioner may therefore have his right to remain curtailed if he fails to comply with any condition of his grant of leave. I was informed that there is no statutory right of appeal where leave is curtailed and that judicial review of the decision is the only remedy available to the petitioner.

[3] The petitioner established a company called Omega Geoservices and Consultancy Ltd (hereafter "the Company") and through the Company offered his services to the oil and gas sector after being granted leave to remain. He operated from 6 January 2015 to the termination of his permission to remain on 10 September 2015. Only one contract was agreed in this period. This was with Velosi Europe Ltd. The contract is dated 29 May 2015 (production 6/4). I was shown an invoice for services rendered in July 2015 amounting to £1905.35 inclusive of VAT (6/5) and an invoice for August 2015 in the sum of £3766.80

inclusive of VAT (6/6). The petitioner lodged copies of reports he had supplied to Velosi Europe Ltd (6/7) evidencing the work he had done in these periods. Counsel drew my attention to the fact that one of the reports indicated that he had supplied services to Velosi Europe on 8 September two days before he was detained on 10 September 2015. The petitioner in submission indicated that the work from Velosi Europe Ltd would have continued but for the petitioner's detention. The respondents accepted that but for the detention the petitioner was likely to have continued to work for Velosi Europe Ltd.

[4] The prospect of the Company continuing to trade ended on 10 September 2015 when, as I have noted, he was detained. On that day immigration officials visited his home. Production 7/7 is a Home Office Minute of the visit made to the petitioner's home in Aberdeen. It records that as a result of information provided by a company called Search Recruitment, the respondent had concluded that the petitioner was in breach of his permission to stay in the UK and as a result visited the petitioner's home address. Officials took possession of documents in the petitioner's home which showed that the petitioner had worked as a security guard. The petitioner's affidavit describes the Petitioner as a "security operative" rather than "security guard". But nothing seems to turn on the distinction. Hence I refer to the Petitioner's employment as that of security guard. Whatever the content of the job description it was not suggested that the employment entailed the provision of expert engineering services. The respondents lodged the documents they discovered at the petitioner's home. There were pay advice slips in the petitioner's name from Search Consultancy (7/4), a P45 from Search Consultancy (7/2) and a contract of employment dated 15 May 2015 with Aberdeen Alarm Company Ltd (7/4). The respondent's position was that these documents showed that he had breached a condition of his leave to remain and was liable to removal.

[5] The petitioner argued that since the Home Office Guidance permitted the petitioner to commence and run other businesses he was at liberty to work as a security guard. It was argued that in reaching the decision to terminate the petitioner's leave to remain, information had been left out of account which showed that he was not an employee and that he had sought to provide his services as an independent contractor trading under a trading name, "Prime Enterprises". Certain invoices purporting to bear this out were lodged (7/3). The petitioner argued his work as a self-employed person for Aberdeen Alarm Company Ltd was not in breach of his permission to remain. It was also argued that where work was undertaken which was ancillary to the business of the Company 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 the Company. 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 the Company traded was work within the scope of his permission. He argued that in light of this the respondent should have exercised the discretion under the Policy to permit the petitioner to remain. In support of these arguments I was shown invoices sent to Aberdeen Alarm Company Ltd (6/8) in the name of "Prime Enterprises" for work performed by the petitioner as a security guard. I was informed that Prime Enterprises was a trading name for the petitioner. It was submitted that these invoices showed that the petitioner was self-employed.

[6] In addressing these arguments I note first of all that the pay slips and P45 show that the petitioner was employed by Search Consultancy. The petitioner was only permitted to remain in the UK if he was employed with a company which he had "established, joined or taken over" (Policy Guidance A/41). It is convenient at this point to set out the terms of the relevant paragraph:

> A41. If you are granted leave to remain as a 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 genuinely self-employed capacity. In this capacity you will have a contract for service.
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> You may not, however, be considered to be working for your own business if the work you undertake amounts to no more than employment by another business (for example, where your work amounts to no more than the 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 contract of service. This applies even if it is claimed that such work is undertaken on a self-employed basis.

The only business the petitioner claimed to have "established, joined or taken over" was the Company. He plainly had not "established" or "taken over" Search Consultancy. Is there any possibility that by taking up employment with Search Consultancy that he could be said to have "joined" Search Consultancy? In my opinion the meaning of the word must be determined from the overall purpose of the Policy Guidance. The Guidance makes it plain that permission may be granted where the applicant is an entrepreneur who wishes to develop business in the UK. I do not consider that the Policy Guidance was meant to apply to persons who join a company as a member of staff unless that employment was connected

in some way to the investment of skills or capital in the business. I do not consider that the petitioner can be said to have "joined" Search Consultancy if it was not with a view for example to investment in or development of that company. The words "established" and "taken over" which bracket the word "joined" suggest that a person "joins" a company within the meaning of the Policy when he or she becomes eg a partner or shareholder in the business with a view to investing in it. 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.

[7] The petitioner argued that the invoices rendered to Aberdeen Alarm Company Ltd had not been properly considered and supported the proposition that he had not been in breach of his permission. I have no reason however to think that the invoices were not examined or that the invoices which suggested the petitioner was self-employed were capable of altering the view the respondent took of the petitioner's conduct. While the Policy Guidance distinguishes employment from self-employment, it does so to show that both are legitimate ways in which a person can work for the business that has been established, joined or taken over. The underlying requirement is that the work must be for the business the entrepreneur has established. Thus where the entrepreneur branches out into another business it does not matter in my judgement whether the employment with the new business is in a self-employed or employed capacity. 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. Thus it does not matter

whether his work for Aberdeen Alarm Company Ltd was as an employee or as a self-employed person. I do not consider that the Policy Guidance is focussed on the form of the Petitioner's employment. The key is whether the work being done whether as an employee or a self-employed independent contractor employment is for the benefit of a business that the petitioner has "established, joined or taken over".

[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 respondents were 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.

[9] The petitioner sought to argue that in working for the security firms he was seeking to promote his own business. It was argued that this would enable him to make contacts which would be for the benefit of his business. The respondent was entitled to take a sceptical view of this claim. The work he performed as a security guard was at a variety of locations and for a variety of businesses. Only one of them involved the provision of security services to a business in the oil and gas sector. It is hard to see how working as a security guard for businesses with no connection to the oil and gas sector could be any advantage to him. For that matter it is hard to see how working as a security guard for a company within the oil and gas sector could lead to useful contacts being formed. The Petitioner did not articulate in submission how this form of employment could truly be said to be connected to or in furtherance of his entrepreneurial ambitions. The obvious explanation for the Petitioner taking up work as a security guard was to supplement his income by working in the evenings. It is evident from the invoices that he was not making a

great deal of money from the Company and so it is understandable that he would wish to supplement his income.

[10] In this connection I should record that I did not find the wording of the second paragraph of Policy Guidance A41 altogether clear. It states "you may not however be considered to be working for your own business if the work you undertake amounts to no more than employment by another business". I do not see what this sentence adds to the preceding paragraph other than to create potential confusion. If an applicant is not working for the business he or she has "established, joined or taken over" then there can be no question of work for "another business" being permitted. The key must be to determine whether there is genuine entrepreneurial activity. The words in brackets simply narrate the forms of employment that a person may have rather than direct attention to the true basis upon which permission to remain is granted.

[11] Although I did not accept that the petitioner's work as a security guard could have benefited his work for his Company in the oil and gas sector, a situation might arise where working for another business in either an employed or self-employed capacity might have collateral benefits for or be connected to a business established by the entrepreneur. The words "no more than" indicate that the employment whatever its form is in essence the same as employment by "another business," that is a business over which the petitioner has no control or in which he has no business interest. It may be worth considering whether the Policy Guidance would be improved if its authors explained what sort of cases they had in mind. The Guidance would also be easier to follow for the ordinary reader if the more familiar language of employment and self-employment were used throughout rather than referring to "contracts of service" and "contracts for service", terms more familiar to employment lawyers.

[12] I was directed to the observations of Lord Ericht in *Ochiemhen* v *Secretary of State for the Home Department* [2016] CSOH 179 at paragraphs 44 and 45. This case was in many ways similar to the present petition. The petitioner was from Nigeria and had likewise worked for Aberdeen Alarm Company Ltd. Lord Ericht took the view that in the circumstances of that case the respondent had failed to take into account a number of factors before reaching her decision. These included (a) the brevity of the time the petitioner had been working for Aberdeen Alarm Company (b) the casual nature of the work performed and (c) the fact that the work was rendered by a company called Alphawhale Ltd which the petitioner had established. In these circumstances he granted the prayer of the petition. In the present case I did not consider that the respondent had left out of account any factors which ought to have been taken into account. Another significant distinction between the petitions is that in *Ochiemhen* the company established by the petitioner was to be the conduit of the security services. Here there is no indication that the petitioner intended the Company to branch out into the security sector and provide such services through the Company. The petitioner took employment with a business he had not started up or taken over. In these circumstances the respondents were entitled to take the view that the petitioner was supplementing his income from the Company with casual labour in the security sector.

[13] I have no reason to doubt that the petitioner wished to grow his business and had he had opportunity the Company might have gone on to be a success. The fact remains however that in this initial stage of establishing his business the petitioner took employment as a security guard working in the evenings for a very low wage. I have nothing but sympathy for him if, as appears to be the case, he worked on his business during the day and worked as a security guard to supplement his limited income at night. The case however cannot be decided on the basis of sympathy but on whether the petitioner has

demonstrated that his legal challenges have been established. I did not consider however that this work was within the scope of his permission.

[14] I should add that Mr Dewar QC who appeared for the petitioner also criticised the way in which the respondents had gone about the task of rescinding the petitioner's permission to stay. In particular he criticised the fact that the Home Office officials arrived at the petitioner's door at 7.30am. I did not consider that there was anything wrong in visiting his home at 7.30 am.

[15] In these circumstances I refuse the prayer of the petition and reserve meanwhile all questions of expenses.