Upper Tribunal
(Immigration and Asylum Chamber) Appeal no: **IA 16165-13**

THE IMMIGRATION ACTS

At **Field House** Decision signed: **01.05.2014**
on **22.04.2014** sent out: **12.05.2014**

Before:

Upper Tribunal Judge
John FREEMAN

Between:

Iris PEREGRINO Quijano

appellant

and

Secretary of State for the Home Department

respondent

Representation:
For the appellant: *Rebecca Stickler* (counsel instructed by Permits2Work/UKVisaAppeal)
For the respondent: Mr Nigel Bramble

DETERMINATION AND REASONS

This is an appeal, by the respondent to the original appeal, against the decision of the First-tier Tribunal (Judge Richard Jones), sitting at Newport on 7 November 2013, to allow outside the Immigration Rules a work permit holder's appeal against refusal of indefinite leave to remain on 24 April 2013, by a citizen of Mexico, born 27 January 1982. For reasons which will soon become clear, the judge was understandably sympathetic towards the appellant; and, though it was accepted before him that she could not meet the requirements of paragraph 134 (iv) of the Rules as they stood by the date of the decision, he allowed the appeal "… because the application should have been granted on a discretionary basis …" and under article 8.

HISTORY

2. The appellant has been in this country since 15 November 2002, first as a student till 31 October 2006, then from 4 November till the same day in 2007 under the Science and Engineering Graduate scheme [SEGS], and finally as a work permit holder from 6 December 2007 till the same day in 2012. In a nutshell, her case depends on the unchallenged fact that, as the Immigration Rules stood at the time she applied for and got a work permit, she could have expected, other things being equal, to get indefinite leave to remain at the end of the five years it lasted. However, some time before her work permit expired, the Rules had changed, so that she needed to satisfy additional requirements, which she could not do.

3. Miss Stickler helpfully provided me with an electronic version of her skeleton argument, from which I have extracted the following summary of the development of the Rules, with explanatory memoranda and ministerial statements as to how they would operate: Mr Bramble did not challenge its accuracy. The starting-point is 6 December 2007, the date of the decision to issue the appellant with a work permit.

4. At that time, the Rules provided that, after five years here on that basis, a person of employable age, who for all that time could maintain themselves without recourse to public funds and could and would undertake only the employment specified in their work permit, for which they had the necessary entry clearance, and were still required for that employment, and had the necessary knowledge of English and of life in the United Kingdom, 'may' be granted indefinite leave to remain, under paragraph 134 as it then stood. While that 'may' imported a discretion, it is common ground that, at the decision under appeal, the appellant continued to satisfy those requirements, and could reasonably have expected the discretion to be exercised in her favour.

5. In February 2008, the statement of changes (HC 321) made no relevant changes in paragraph 134, though it allowed time spent under the Highly Skilled Migrant Programme [HSMP] to count towards the five years. In June 2008 (HC 607), time spent in other categories was added to that provision. In November that year (HC 1113) there were more far-reaching changes: no more work permits were to be issued, but pending applications, and applications by existing work permit holders, would be dealt with 'under the existing Immigration Rules'.

6. The explanatory memorandum to HC 1113 contained, at paragraph 6.13, this assurance about the changes made: the new tier 2 Rules would

> *… include transitional arrangements to minimise their impact on existing work permit holders. Provided they are working for the same employer, their job meets our skill level requirements and their employer has obtained a sponsor licence, these migrants will be able to extend their stay in the UK up to a total of five years without having to meet the specific Tier 2 criteria for qualifications, prospective earnings and English language.*

7. In March/April[1] 2011 HC 863 for the first time made a change in paragraph 134 which was potentially relevant to this appellant's case: it now included a requirement that the work permit holder's employer "… certifies that he is paid at or above the appropriate rate for the job as stated in the codes of practice for tier 2 sponsors published by the UK Border Agency". This time the relevant part of the explanatory memorandum ran as follows:

> 7.12 As a transitional arrangement, Tier 2 (General) Migrants, and those in pre-Tier 2 predecessor categories (such as Work Permit Holders) who are already in the UK under the Rules in place before 6 April 2011 will be able to apply to extend their stay without being subject to the annual limit, the new graduate level job requirement, the new salary threshold, or the new English language level. This applies whether they are extending with the same employer or changing employers.
>
> 7.13 As with Tier 2 (General) Migrants, Work Permit Holders applying for indefinite leave to remain will need to provide confirmation that they continue to earn at least the UK appropriate rate for the job they are doing.

8. In October 2011, HC 1511 again changed paragraph 134, this time with reference to the documents to be provided; but once more the explanatory memorandum gave the following reassurance: the April changes had required work permit holders and others

> … to demonstrate that they are continuing to meet at least the minimum income threshold which applied when they last extended their permission to stay in the UK. …. For Tier 2 and Work Permit migrants, their employer must certify in writing that they are being paid at or above the appropriate rate for the job as set out in codes of practice published by the United Kingdom Border Agency.

There had been a similar reassurance given in a ministerial statement of February 2011.

9. In March 2012 HC 1888 deleted what were described in the explanatory memorandum as "redundant provisions relating to Work Permit employment …", but left paragraph 134 as it stood. However in June/July the following changes were made to paragraph 134: HC 194 inserted the requirement that a work permit holder "… must not be in the UK in breach of immigration laws except that any period of overstaying for a period of 28 days or less will be disregarded". This would have ruled out this appellant, by a matter of only four days: as seen at **2**, the gap there between the end of her SEGS leave on 4 November and the start of her work permit holder leave on 6 December 2007 had been no more than 32 days.

10. In July 2012 a further statement of changes (Cm 8423) made changes which Miss Stickler suggested, clearly rightly on the evidence of the explanatory memorandum, were intended to make those of March/April 2011 (HC 863) comply with *Pankina* [2010] EWCA Civ 719. References to "the codes of practice for tier 2 sponsors published by the UK Border Agency" were replaced with "the Codes of Practice in appendix J". In November/December there were further changes (HC 760), not at all relevant here.

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[1] ie statement of changes laid before Parliament on 16 March, taking effect on 6 April

11. Finally, in March/April 2013[2] HC 1039 made changes to paragraph 134 which are not relevant in themselves, but which incorporated new codes of practice in appendix J. The explanatory memorandum contained the following statements:

> 7.7 The Codes of Practice are contained in Appendix J of the Immigration Rules. They set out which occupations are skilled to the appropriate levels and the minimum appropriate salary rates for jobs in each occupation. They apply … to work permit holders applying for settlement. Changes are being made following a review by the Migration Advisory Committee.
>
> 7.11 These changes do not affect applicants who have a Certificate of Sponsorship from their sponsoring employer that was assigned before the changes come into effect on 6 April 2013; no work permit holders … are prevented from extending their stay to continue working in the same job for the same employer as a result of their occupation being reclassified at a different skill level.

12. On 24 April, only 18 days after those changes took effect, the Home Office refused the appellant's application for indefinite leave to remain. They gave as their only reason that the appellant was paid only at an hourly rate of £10.41, while code 3541, in appendix J, set £11.44 as the rate for a "buyer and purchasing officer", the appropriate category for her employment.

ERROR OF LAW?

13. There is no dispute but that the rates given in the refusal letter were correct at the time, and properly applied to the appellant, in terms of appendix J as it stood by then. The judge noted this state of affairs at paragraph 15; but at paragraph 16 he went on to allow the appeal, on the basis that the decision was not in accordance with the law. He gave the following reasons for this:

> … the Points Based System was not in existence at the time when [the appellant] was granted her work permit visa. She came under the old system and not the new one and never needed and never held a certificate [*sci. an employer's certificate of compliance with the salary requirements in the code of practice*] No guidance as to the salary level applicable to her existed when she was granted her visa and … having regard to … *Philipson [(ILR - not PBS: evidence) India [2012] UKUT 39 (IAC)*], at paragraph 14, that as there was no guidance as to the salary level applicable to her, paragraph 134 (iv) would not apply and that her application for indefinite leave to remain should have been granted.

14. It is now time to discuss *Philipson*: there are two main things to be said about this decision. First it was heard on 19 December 2011, long before the 'new Rules' (in force from 9 July 2012) and the changing attitude to article 8, starting in *MF (Nigeria)* [2013] EWCA Civ 1192, and since extended outside deportation cases, to which that decision gave rise.

15. Second, paragraph 14 of *Philipson* does no more than record an assumption made by the Tribunal: it runs as follows

> First, although we will assume for present purposes, without deciding, that there is an appropriate salary rate for the claimant's job issued under the Tier 2 guidance on 6 April 2011

[2] laid 14 March, taking effect on 6 April

> because transitional arrangements D applies [*sic*] to her, we are far from convinced that this is the case. Transitional arrangement D refers to those who hold a Tier 2 certificate of sponsorship and the certificate of sponsorship confirms that the holder will be working as a senior care assistant (SOC code 6115). As we understand it the claimant never needed a certificate of sponsorship because she came under the old system and not the new PBS one and accordingly never held one. If there was no guidance as to the salary level applicable to her, then rule 134(iv) would not apply and her claim to settlement should have been granted without more.

16. The fact that this was all an assumption on the Tribunal's part does not of course mean that the judge was not entitled to come to the same conclusion; but, since the point was in issue before him, he needed to give reasons for doing so, rather than relying on something which was not only *obiter*, but specifically left undecided by the Tribunal. On that basis, there was an error of law on the part of the judge in dealing with the appeal under the law and the Rules, and I shall need to re-make that part of his decision for myself.

17. If I reach the same result as the judge did, then there will be no reason to consider article 8. If I do not, then I shall have to re-decide the appellant's article 8 appeal on the basis of my own decision on the law and the Rules, and current authorities, not available to the judge, such as *Gulshan* (Article 8 – new Rules – correct approach) Pakistan [2013] UKUT 640 (IAC), and *Shahzad* (Art 8: legitimate aim) Pakistan [2014] UKUT 85 (IAC)).

DECISION RE-MADE: LAW AND RULES

18. The first question to be decided is about what rules applied to this appellant's case at the date of the decision. Miss Stickler sought to supplement the judge's reliance on *Philipson* by reference to *Ferrer* (limited appeal grounds; Alvi) Philippines [2012] UKUT 304 (IAC). As the long title suggests, *Ferrer* was not mainly decided on this point at all; but it does contain the following proposition, as summarized in paragraph (6) of the judicial head-note:

> *Applying Philipson (ILR – not PBS: evidence) [2012] UKUT 00039 (IAC), where the provisions in question are ambiguous or obscure, then it is legitimate to interpret the provisions by assuming that Parliament is unlikely to have sanctioned rules which (a) treat a limited class of persons unfairly; and (b) disclose no policy reason for that unfairness.*

19. The next point is about whether the Rules as they stood at the date of the decision under appeal (24 April 2013) either contained no guidance as to the salary level to be applied in this appellant's case (*Philipson*) or were ambiguous or obscure in their provisions (*Ferrer*). Paragraph 134 (iv) of the Rules, as it stood at the date of the hearing in either of those cases, required of a work permit holder applicant for indefinite leave to remain that

> … his employer certifies that he is paid at or above the appropriate rate for the job as stated in the code of practice for Tier 2 sponsors published by the UK Border Agency

20. It was perhaps surprising, on the face of it, that a work permit holder should be asked to satisfy the requirements of a new separate code under the points-based system [PBS]; but I am not concerned with the merits of any argument that this provision either gave no guidance, or was ambiguous or obscure as to how it related to work permit holders at the time of those decisions, when it was in force.

21. The reason is that, by the date of the decision in the present appeal, there was a different provision in paragraph 134, which now requires, very specifically, that an applicant:

> (i) has spent a continuous period of 5 years lawfully in the UK, of which the most recent period must have been spent with leave as a work permit holder (under paragraphs 128 to 133 of these rules) … [and]
>
> (iv) provides certification from the employer that the applicant is paid at or above the appropriate rate for the job as stated in the Codes of Practice in Appendix J

22. Subject to appropriate job classification, as to which there is no issue here, that could not in my judgment be clearer. This appellant does satisfy (i), but that in turn requires her, as a work permit holder, to satisfy the Codes of Practice, which it is accepted she could not, and cannot do. There is no 'lack of guidance' and no 'ambiguity or obscurity', and the judge's decision on this point can neither be supported by the reason he gave for it, nor by any more informed reference to *Philipson* or *Ferrer*, so far as the actual or presumed meaning of the Rules at the date of the decision are concerned.

23. That leaves Miss Stickler's next argument, which is that, for reasons which may already be clear, based on the legislative history of paragraph 134 (iv), it was unfair of the Home Office to apply it to this appellant, as it stood at the date of their decision. The leading decision on the effect of changes in the Immigration Rules on someone who may have counted on them staying as they were is still *Odelola* [2009] UKHL 25 .

24. Dr Odelola was a medical practitioner with a degree from an overseas institution, whose application for further leave to remain was pending when the Rules changed, so as to require a United Kingdom degree. The leading speech was delivered by Lord Brown of Eaton-under-Heywood, who expressed the *ratio* in this way at paragraph 39:

> I have no doubt that the changes in the immigration rules, unless they specify to the contrary, take effect whenever they say they take effect with regard to all leave applications, those pending no less than those yet to be made.

25. All the Lords of Appeal agreed with that, and with Lord Brown's additional point that justice imperatively required the appellant's fee to be returned to her. There was also general agreement that statements of changes to the Immigration Rules operated as signposts to the administrative practice to be followed from time to time, rather than creating any legitimate expectation of or vested right to their remaining as they were.

26. For the reasons given in *Odelola*, I do not think the Home Office's assurances about future practice, given with HC 1113, can help this appellant, on the Rules to be applied to her case. While the assurances given at paragraph 7.12 of the explanatory memorandum to the statement of changes of March/April 2011 (HC 863: see **7**) appear to be in conflict with the changes themselves, which referred to the 'codes of practice for tier 2 sponsors', that is as far as the appellant's case can go, in terms of Home Office assurances, not about future, but about present practice in applying the Rules as they stood when made.

27. The changes made in March/April, and in October 2011 (HC 1511) were unlawful, being contrary to *Pankina*, as implicitly recognized in July 2012 (Cn 8423). However, from that point on, the administrative practice likely to be adopted by the Home Office in a case of this kind was perfectly clear, and, from July 2012, perfectly lawful. Whether it was fair, in the ordinary sense of the term, does not in my judgment help her, much as I might regret that: it is an inevitable consequence of *Odelola*. As with Dr Odelola, this appellant certainly ought to have her fees returned to her; but that is not the real subject of her appeal.

28. The result is that the appellant's case fails, on the basis of her position under the Rules as they stood at the date of the decision under appeal. Nor does she have the benefit of any back-dated pay to bring her above the minimum required at that time, as in *Philipson*. It only fails by a very small amount. Miss Stickler gave me figures which were not in dispute: at the date of the application, the appellant was earning £10.52 an hour, while appendix J required £11.44. Grossed up to an annual figure, her actual earnings of £10.81 at the date of the hearing made £22,484.80, an annual shortfall of only just over £15 from the £22,500 now required.

29. However Miss Stickler recognized that, following *Miah & others* [2012] EWCA Civ 261, a 'near-miss' could not be regarded as substantial compliance with the Rules; not even if it were a very near miss indeed, as in this case. That must also apply to the four days by which the appellant missed out (see **9**) on the ten years' lawful residence she would have needed for indefinite leave to remain under paragraph 276B. Such considerations might be thought to lessen the public interest in her removal, so far as the balancing exercise under article 8 was concerned; but I shall deal with that later.

30. The appellant's employers clearly value her, and are anxious to keep her on; she has an agricultural diploma from this country, and they say her knowledge of Spanish is particularly valuable to them in dealing with suppliers in their fruit and vegetable trade. However they have other workers to consider, and say they cannot increase her pay-rate without trouble from them. I have to deal with this appellant according to what she is actually paid, and on that basis she cannot succeed under the Immigration Rules as they have stood since July 2012.

ARTICLE 8

31. The judge noted at paragraph 18 that the appellant could not meet the requirements of paragraphs 276ADE or DE of the 'new Rules' and Miss Stickler accepted that this was correct. No doubt at the time he was writing, it had not occurred to him, or to a good many other first-tier judges, that the various decisions which have followed the 'new Rules' (some in any case not available at that time) might affect the approach to be taken to article 8 in cases not involving deportation. However, it is now clear that, where a case is covered by the Rules, it is wrong in law to go straight to an open-ended consideration of article 8; and the judge's article 8 decision would in any case need to have been re-made for that reason.

32. Miss Stickler accepted that, for an appeal of this kind to succeed under article 8, there would have to be some 'exceptional' or 'compelling' features in the case – provided that the Rules covering it formed, in the words used in *MF (Nigeria)*, a 'complete code'. In suggesting that the Rules to be applied in this case did *not* do so, she referred me to *Shahzad* at paragraph 29; but it seems to me that the point is best illustrated by the following paragraphs:

> 30. It follows from the other part of the ratio of *MF* - that the new rules on deportation of foreign criminals are a complete code because they contain an express provision requiring consideration in the Article 8 context of "exceptional circumstances" and "other factors" - that any other rule which has a similar provision will also constitute a complete code (rule S-EC.1.4, dealing with exclusion, would seem to be a further example);
> 31. Where an area of the rules does not have such an express mechanism, the approach in *R (Nagre) v Secretary of State for the Home Department* [2013] EWHC 720 (Admin) ([29]-[31] in particular and *Gulshan (Article 8 – new Rules – correct approach)* [2013] UKUT 640 (IAC) should be followed: i.e. after applying the requirements of the rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them.

33. It seems to have been assumed in *Shahzad* that, because Part 5 of the Immigration Rules: 'Persons seeking to enter or remain in the United Kingdom for employment' does not contain any reference to article 8, or to exceptional circumstances, it cannot be a 'complete code' within the meaning given to that in *MF (Nigeria)* . I shall go on to assume that this is right, and so the procedure set out in *Shahzad* has to be followed.

34. Deciding first whether there are 'arguably good grounds for granting leave to remain outside the rules', this appellant is a very worthwhile member of society, who has now spent very nearly all the last 11½ years in this country, without becoming the subject of reproach of any kind. As the judge found, she has no 'family life' here; but she is clearly an appealing person, who may be assumed to have as much or more 'private life' in this country over that time as anyone else. That could not in itself be enough to outweigh the public interest considerations in removing those who are unable to satisfy the requirements of the Rules approved by Parliament for deciding who is to stay, and who to go, even, as in this case, where the margin is very small.

35. The appellant's only real argument on article 8 comes back to the perceived unfairness, not of her treatment as an individual, but of the changes in the Rules, as they affected anyone in her position. The primary jurisdiction of the appellate authorities to allow an immigration appeal comes from s. 84 (1) of the Nationality, Immigration and Asylum Act 2002, specifying the grounds on which it may be brought as follows:

a) that the decision is not in accordance with immigration rules;
b) that the decision is unlawful [*as racially discriminatory*]'
c) that the decision is unlawful [*as*] contrary to Human Rights Convention …;
d) that the appellant is an EEA national or a member of the family of an EEA national and the decision breaches the appellant's rights under the Community Treaties in respect of entry to or residence in the United Kingdom;

e) that the decision is otherwise not in accordance with the law;

f) that the person taking the decision should have exercised differently a discretion conferred by immigration rules;

g) that removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights.

36. Looking at the individual grounds, the only ones which have been relevant to this case are (a), (c)/(g) [*the human rights limb only, apparently duplicating (c)*], and (e). While paragraph 134 now begins "Indefinite leave to remain may be granted on application …", seemingly importing a discretion, it is quite clear from the following words that this may *only* be exercised "… provided the appellant" can meet the individual requirements which follow; so (f) does not apply. *Odelola* to my mind disposed of any argument under the law outside the Rules and the Human Rights Convention, removing the need to consider (e). It follows that the area remaining for consideration has come down to a potential conflict between (a), where the requirements of the Rules are treated as a given, at least for the appellate authorities; and (c)/(g), which requires respect for the Human Rights Convention.

37. While there remains ample scope for application of the Human Rights Convention in cases where appellants have significant family life in this country, it seems to me that it would be wrong to use the Convention effectively to side-step the decisions in *Odelola* (allowing the Home Office to change the Rules from time to time as they see fit) and *Miah*, where Stanley Burnton LJ, giving the only reasoned judgment, said this at paragraph 26:

> In my judgment, there is no Near-Miss principle applicable to the Immigration Rules. The Secretary of State, and on appeal the Tribunal, must assess the strength of an Article 8 claim, but the requirements of immigration control is [*sic*] not weakened by the degree of non-compliance with the Immigration Rules.

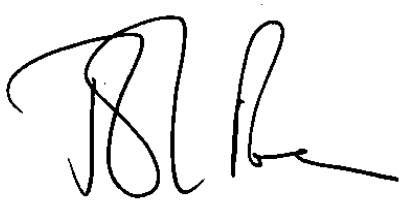
38. The appellant in this case accepts that the 'near-miss' principle cannot allow her to succeed; and, on the basis of that authority, it is hard to see how it could help her at all. Her real complaint is that the Immigration Rules which have been laid before Parliament from time to time are unfair to her, or to anyone else in her position, because of the assurances given on previous occasions. In the light of *Odelola*, the Secretary of State did not need to give such assurances, though clearly they might have lulled persons in the appellant's position into a false sense of security.

39. However, that could only have been the position up to 2011: while the changes made during that year might have been ineffective on challenge under the rule in *Pankina*, only a rather learned immigrant could have been expected to realize that defect; and only a particularly optimistic one to believe that it would not be put right, as it was in July 2012. From then on, the present terms of the Rules have been quite clear, and there is no room for the operation of the presumption referred to in *Ferrer*.

40. Even if a fairness argument were available to this appellant, I do not think it would have been necessarily unfair for the Secretary of State to expect that a person in her situation, with 20 months of her work permit leave to run at the date of the April 2011 changes, should have been unable to get a job or a wage which satisfied the requirements for tier 2 of the PBS, before applying for further leave to remain. The appellant's argument on the perceived unfairness of the changes made to the Rules can in my view no more succeed under article 8 than on the terms of the Rules themselves.

41. It follows that the appellant's appeal must be dismissed; but, as I have already made clear, she is an entirely worthy person, for whom I have a great deal of sympathy, as clearly did the judge. Now the Home Office have established the principle for which they contended, they might well like to consider giving her leave to remain outside the Rules; but that of course must be entirely up to them.

Appeal dismissed



(a judge of the Upper Tribunal)