



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/31462/2014  
IA/31463/2014

**THE IMMIGRATION ACTS**

Heard at Field House  
On 13 March 2015

Determination Promulgated  
On 25 March 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR RAMESH DHARMASRI SAMARASINGHA DISSANAYAKA  
MS SHEREEN NADEERA KARUNARATHNA

Respondents

**Representation:**

For the Appellant: Ms E Savage, Senior Home Office Presenting Officer

For the Respondents: Ms K Reid, instructed by Indra Sebastian Solicitors

**DECISION AND REASONS**

1. The Respondents are citizens of Sri Lanka whose dates of birth are recorded as 1 October 1984 and 17 May 1988. They are husband and wife. The Second Respondent's case is entirely dependent upon that of the First Respondent. Together they first entered the United Kingdom on 13 August 2012 with the First Respondent as a Tier 4 (General) Student. His visa was valid until 28 June 2014. The First Respondent was able successfully to apply for the position of Human Resources

Manager at a hotel and so made application on 26 June 2014 for a combined application for further leave to remain in the United Kingdom as a Tier 2 (General) Migrant for a Biometric Residence Permit. His wife made application at the same time as a dependent. On 23 July 2014 a decision was made to refuse the applications. The Certificate of Sponsorship submitted in accordance with paragraph 77A to Appendix A to the Immigration Rules stated that the proposed employment would commence on 25 June 2014 with a finishing date of 24 June 2019. Because the employment would take the First Respondent's total stay in the United Kingdom as a Tier 2 Migrant over three years and one month his salary was said to be such that it would be subject to the experienced worker appropriate salary rate. The minimum acceptable rate of pay for a 40 hour working week for the prospective employment was £31,900 per annum having regard to the occupation code applied under Appendix J to the Immigration Rules but as the Certificate of Sponsorship spoke of a salary of £22,200 per annum for a 39 hour week the requirements of the rule were not met.

2. The Respondents appealed and on 11 November 2014 their appeals were heard by Judge of the First-tier Tribunal Chohan sitting at Birmingham. Judge Chohan accepted Ms Reid's submissions that there was nothing in the Immigration Rules to suggest an applicant could not be granted leave to remain for three years or more if a new entrant. There was in Ms Reid's submission to Judge Chohan ample evidence that the First Respondent was a new entrant and a graduate and that in those circumstances the Secretary of State should have granted a visa for three years and one month. The significance of three years and one month arises because of the provisions of Paragraph 14 to Appendix J. That provides:

"14) Where these rules state that an applicant must be paid the appropriate rate for a job as set out in this appendix, the rate will be determined as follows:

...

- d) Where both "New Entrant" and "Experienced Worker" rates are stated, in tables 1-5, the "New Entrant" rate will only apply if the applicant:

...

- iv) was under the age of 26 on the date the application was made, and is not applying for a grant of leave that would extent his total stay in Tier 2 and/or as a Work Permit Holder beyond three years and one month.

The "experienced worker" rate will apply in all other cases."

3. Judge Chohan found the issue to be a narrow one "i.e. whether the [First Respondent] when he made his application, was a new entrant or an experienced worker and whether his salary fell within the required limits." The judge found that although the evidence pointed to a post being offered to the First Respondent for a period of five years it was not incumbent on the Secretary of State to grant a visa for a five year period. It was open to the Secretary of State simply to have granted a visa for three years and one month so as to bring the First Respondent and indeed then the Second Respondent within the Immigration Rules. The judge noted that the letter from the hotel which was produced at the hearing, but not it would seem in the

application itself, made it clear that, "If he is only able to get three years visa I am still happy to offer him the job."

4. There is no issue that the code, 1135 was the appropriate code and were it the case that the First Respondent were entitled to succeed as a new entrant he met the minimum earning requirement being in excess of £22,200.
5. Not content with the decision of Judge Chohan, by Notice dated 1 December 2014 made application for permission to appeal to the Upper Tribunal on the basis that as the application was for a grant of leave that would extend the First Respondent's total stay in Tier 2 beyond three years and one month it was not open to the judge to find as he did. On 21 January 2015 Judge Holmes granted permission thus the matter comes before me.
6. The arguments which were advanced before the First-tier Tribunal were rehearsed. The Certificate of Sponsorship clearly states under the heading, "Work or Study Details," "start date: 25 June 2014, end date 24 June 2019". The Certificate of Sponsorship which is a mandatory requirement given the wording of 77A which states: "In order to obtain points for a Certificate of Sponsorship, the applicant must provide a valid Certificate of Sponsorship reference number and such is clearly part of the application given the remaining provisions of Paragraph 77. It is clear that it forms part of the application because the rules make provision for no points being awarded if after checks being made certain requirements are not met. Here it is perfectly clear that the information provided to the Secretary of State was for a period of five years.
7. The effect of Ms Reid's submission is essentially to say that the Secretary of State should have cured the defect in the application. Ms Reid simply submits that the Secretary of State should have provided a visa for that shorter period. The difficulty with that is that the Secretary of State could not have known when making her decision whether the job would have been available to the applicant for that shorter period and in any event the wording in Appendix J is clear, "and is not applying for a grant of leave that would extend his total stay..."The First Respondent was applying for that period. Essentially Ms Reid submits that the application should have been amended I reject that submission. The final part of Paragraph 14(d) in my judgment puts the matter beyond doubt when it states: "the (Experienced Worker)" rate will apply in all other cases.
8. Ms Reid submits that that was some unfairness. However it is helpful to set out the observations of Sales LJ in *EK (Ivory Coast) v Secretary of State for the Home Department* [2014] EWCA Civ 1517 at paragraph 28:

"The Points Based System is intended to simplify the procedure for applying for leave to enter or remain in the United Kingdom in certain classes of case, such as economic migrants and students. This is to enable the Secretary of State to process high volumes of applications in a fair and reasonably expeditious manner, according to clear objective criteria. This is in the interests of all applicants. It also assists applicants to know what evidence they have to submit in support of an application."

9. In all the circumstances I find that there was a material error of law and that in remaking the decision of the First-tier Tribunal the appeals and each of them are dismissed. Whether the Respondents to the Upper Tribunal can make a fresh application to the Secretary of State on a basis which is open to them will be a matter for their advisors.

**Notice of Decision**

The Secretary of States appeal to the Upper Tribunal is allowed. The decision of the First-tier Tribunal is set aside. The decision of the First-tier Tribunal is remade and the appeals and each of them are dismissed.

**Signed**

**Date 25 March 2015**

**Deputy Upper Tribunal Judge Zucker**

**TO THE RESPONDENT**  
**FEE AWARD**

As the appeals have been dismissed, there will be no fee award.

**Signed**

**Date 25 March 2015**

**Deputy Upper Tribunal Judge Zucker**