IAC-BH-PMP-V1

First-tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/34486/2014

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke-on-Trent	**Determination Promulgated**
On 7th January 2015	**On 16th January 2015**

Before

DESIGNATED JUDGE OF THE FIRST-TIER TRIBUNAL COATES

Between

MISS PHATTRA PHIROMNAM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Vokes instructed by Cartwright King Solicitors
For the Respondent: Mrs H Aboni, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Thailand born on 2nd December 1981. She has appealed against the Respondent's decision made on 20th August 2014 to refuse to vary leave to remain in the United Kingdom and to remove by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.

2. The Appellant was present at the appeal hearing. She speaks fluent English and did not require an interpreter. Representation was as mentioned above.

3. I heard oral evidence from the Appellant and one witness. I heard submissions from both representatives and I have taken into account the following documents:

   (i) The Respondent's bundle.

   (ii) A paginated and indexed bundle of documents submitted by the Appellant's representatives.

   (iii) Home Office PBS evidential flexibility guidance.

   (iv) Skeleton argument on behalf of the Appellant.

4. At the end of the hearing I reserved my decision which I now give with my reasons.

5. In immigration appeals the burden of proof is on the Appellant and the standard required is a balance of probabilities. As this is an in-country appeal I able to take into account matters appertaining up to and including the date of the hearing.

6. The Appellant's immigration history shows that she first entered the United Kingdom on 19th September 2007 with entry clearance conferring leave to enter until 31st October 2009 as a student. On 17th August 2009 the Appellant was granted leave to remain until 17th August 2011 as a Tier 1 (Post-Study) Migrant. On 4th July 2011 the Appellant was granted leave to remain in the United Kingdom until 18th August 2014 as a Tier 2 (General) Migrant.

7. The Respondent's reasons for refusing the application which is the subject of this appeal are set out in a Home Office letter dated 20th August 2014. The application was considered under the points-based system and the Appellant was awarded 20 points as claimed for appropriate salary; she was awarded 10 points as claimed under Appendix B: English language and she was awarded 10 points under Appendix C for maintenance. The application was refused because the Appellant was awarded no points under Appendix A: attributes for sponsorship. The Respondent was not satisfied that the job which she was being sponsored for met the minimum required skill level as defined in Appendix A on the Codes of Practice. The certificate of sponsorship stated that her prospective employment most closely corresponds to occupation code 3111 on the Home Office's Codes of Practice for Sponsors. This occupation code is not on the list of NQF level 4 occupations, as stated in the Codes of Practice. Therefore, the Appellant did not qualify for the NQF 4 level skill exemptions as laid out in Appendix A of the Immigration Rules. For those reasons no points were awarded in respect of sponsorship.

8. Detailed Grounds of Appeal were submitted by the Appellant's representatives by letter dated 29th August 2014. The grounds seek a review of the Respondent's decision and point out that the Appellant's Sponsor had chosen code 3111 as they had incorrectly assumed that she

would be able to continue to work for the same Sponsor in the same occupation as the previous visa had allowed her to do. As far as they were concerned only a simple extension was required to allow the Appellant to carry on in her present job. The grounds further point out that the Tier 2 Guidance for Sponsors is a highly complex document and was simply misinterpreted by the Sponsor who thought that they could assign the same SOC code as was used previously as she was carrying on working for the same Sponsor in the same occupation. Clearly this was a mistake on the part of the Appellant's Sponsor and was no fault of hers. However, the consequences are very serious because she now faces removal from the UK.

9. I do not propose to recite the grounds in further detail at this stage because they are largely repeated in the skeleton argument provided by Mr Vokes on behalf of the Appellant, to which I will refer later.

10. The Appellant was called to give evidence and adopted as her evidence-in-chief her witness statement which is at pages 94 to 98 in the appeal bundle. In summary, the Appellant's case is as follows.

11. The Appellant entered the UK in September 2007 to study for a masters degree. She was then granted leave to remain as a Tier 1 (Post-Study) Migrant. In July 2011 she received her first Tier 2 visa and was sponsored by her current employer, Liphook Equine Hospital, as a laboratory technician. Her visa was valid until August 2014. The Appellant enjoyed her work with the equine hospital.

12. As the Appellant was proposing to extend her visa in the same role with the same Sponsor it was considered acceptable to extend using the existing code. The Appellant considers that she was misled by the guidance because it was not clear that she needed to have a different SOC code when continuing in the same role with the same employer.

13. The Appellant was shocked when she received the decision refusing further leave. Having taken advice, the Appellant's employer was informed that due to the fact that her job was at level 3 prior to the reclassification that the exemption regarding the SOC code change would not apply in her case and she should have been looking to do a job at a higher level. Ironically, in February 2014 a job for a higher level post was advertised at the practice where the Appellant worked. The Appellant did not apply for it at that stage because she was happy in her present job and did not feel the need to apply. With the benefit of hindsight, she realised that had she been informed about the required skill level she would have started to apply for jobs such as microbiologist either within her current organisation or elsewhere.

14. The Appellant points out that she has been in the UK for seven years and is well settled. She thoroughly enjoys her job and is well regarded by her employer. She has a good immigration record and has never intentionally breached the Immigration Rules.

15. The Appellant was asked by Mr Vokes to clarify her present situation with particular reference to paragraph 9 of her witness statement. At that point in the statement the Appellant claims that many of the jobs which she carries out can be done by microbiologists. Periodically roles become available within the organisation for microbiologists and the Appellant has applied for one such post. In response to Counsel's question, the Appellant explained that this application is presently "on hold" pending the outcome of her immigration appeal. No decision has as yet been made.

16. I then heard evidence from Ms Carrie Goodbourn who is the Appellant's employer at Liphook Equine Hospital. Ms Goodbourn adopted as her evidence-in-chief her witness statement which is at page 99 in the appeal bundle. In response to supplementary questions from Mr Vokes, Ms Goodbourn confirmed that the Appellant had used the same code in her certificate of sponsorship as that which had applied previously.

17. At paragraph 10 of her witness statement Ms Goodbourn states that her company always needs experienced microbiologists and they have recently advertised for such a position. They have had some applicants and intend to interview them at the end of the period of advertisement. The Appellant has also applied and if she proves to be the correct candidate for the role they would wish to employ her. Ms Goodbourn stated that in her opinion the Appellant is a perfect candidate for the role of microbiologist. She said that the equine hospital is the biggest laboratory of its type in Europe. New staff are regularly required. They cannot find experienced microbiologists at the present time. Losing the Appellant as an employee would have a dramatic effect on the company. So far no applicants have come forward who possess all the requisite qualifications except for the Appellant.

18. Neither the Appellant nor Ms Goodbourn were challenged by Mrs Aboni in cross-examination.

19. At the end of the evidence, Mrs Aboni's submission on behalf of the Respondent was short and succinct. She relied upon the Respondent's reasons for refusal letter. She said it was accepted that the Appellant and her employer had made a genuine mistake. However, she submitted that there was no obligation on the Home Office to make further enquiries and that the decision to refuse the application was justified.

20. For the Appellant, Mr Vokes relied upon his skeleton argument which is equally clear.

21. It is submitted on behalf of the Appellant that an inadvertent error had been made in relation to her Tier 2 (General) Migrant application in that she did not realise, and neither did her employer, that to merely carry on working as a laboratory technician under code 3111 did not qualify her for leave to remain under NQF level 4. Given the complexity of Tier 2 guidance, and the Codes of Practice, this was an understandable mistake. It is noted that the Respondent did not contact the Appellant or her employer to consider whether indeed the Appellant's employment had been correctly characterised, or whether a re-evaluation would show skills equal to NQF

level 4. It is argued that this appears to be in breach of the policy in respect of points-based system: evidential flexibility and the necessity of enquiry where it is possible that an applicant meets the criteria for leave to remain – for if the missing information was provided the Appellant could have succeeded. There is no evidence that the policy was even considered in relation to the application which was made.

22. It occurs to me that in this context the concept of evidential fairness, as explained in recent decisions such as Rodriguez, is of relevance.

23. Mr Vokes further argues on behalf of the Appellant that the refusal without enquiry or explanation in relation to the policy takes on greater significance as the Appellant does not have the opportunity to correct the matter within the Rules by making another "in time" application as her leave expired on 18th August 2014 and the decision under appeal was made on 20th August. The Tribunal is required to determine any matter raised as a Ground of Appeal; evidence can be considered as to the fairness of the decision taken, because the question of fairness and the exercise of discretion was raised as a Ground of Appeal. The Appellant meets the criteria for microbiologist (and indeed had her job been re-valued would have done so at the date of application) and a resident labour market test by her employer (now undertaken) shows the necessity of her employment by her company.

24. It is submitted that the Appellant's present position is now troubling. If required to return to her home country in order to make a further application for entry clearance as a Tier 2 Migrant, she would have to wait a further twelve months to do so because of the Respondent's policy for a "rest period" between applications and so it is unlikely she could continue to work for her present employers and so the refusal would have severe consequences for her.

25. Mr Vokes also points out that the Respondent's bundle contains papers relating to an entirely separate case, which reinforces the impression that the Appellant's application had not been properly considered. This is in fact a reference to a matter which I raised with the representatives at the commencement of the appeal hearing because I noticed that the Respondent's bundle contains a reasons for refusal letter addressed to a Ghanaian applicant who had applied for an EEA residence card. A Notice of Refusal to issue a residence card, addressed to the same Ghanaian applicant, is also included. Whilst that is obviously a mistake, it suggests a singular lack of care in preparing the papers for this case. So far as the documents themselves are concerned, I confirm that I have disregarded them because the contents were of no relevance whatsoever to this appeal.

26. I agree with Mr Vokes that the question of procedural fairness in the decision-making process is an emerging area of law before the Tribunal as evidenced by cases such as Rodriguez and Miah, which is mentioned in Mr Vokes' skeleton argument. I have concluded that principles of fairness and the Respondent's declared policy would show that the decision under appeal is procedurally unfair for the reasons of not considering and/or not applying the policy. I conclude that the appeal should be allowed on the

basis that the decision is not accordance with the law. It therefore remains outstanding with the Respondent for a lawful decision to be taken.

NOTICE OF DECISION

The appeal is allowed.

There is no order for anonymity since none has been requested.

Signed Date 9th January 2015

Judge Coates
Designated Judge of the First-tier Tribunal

TO THE RESPONDENT
FEE AWARD

Even though I have allowed the appeal, I have decided not to make a fee award because there was an error in the original application. Had such error not been made this hearing could have been avoided.

Signed Date 9th January 2015

Judge Coates
Designated Judge of the First-tier Tribunal