Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/01295/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 13th June 2013	**On 1st July 2013**

Before

UPPER TRIBUNAL JUDGE RENTON

Between

POORITA EK-AMNUAI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Unrepresented
For the Respondent: Mr C Avery, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a female citizen of Thailand, born on 12th September 1983. On 12th October 2012 she applied for leave to remain as a Tier 2 (General) Migrant. That application was refused for the reasons given in the Notice of Decision dated 20th December 2012. The Appellant appealed, and her appeal was heard by Judge of the First-tier Tribunal

Wyman (the Judge) sitting at Hatton Cross on 3rd April 2013. She allowed the appeal on the basis that the Respondent's decision was not in accordance with the law for the reasons given in her Determination promulgated on 15th April 2013. The Respondent sought leave to appeal that decision, and on 30th April 2013 such permission was granted.

Error of Law

2. I must first decide if the decision of the Judge contained an error on a point of law so that it should be set aside.

3. The application for leave to remain was refused because the Appellant failed to score any points for Appropriate Salary under Appendix A of HC 395. This was because according to the Appellant's Certificate of Sponsorship her prospective employment most closely corresponded to occupation code 1132 of the Codes of Practice set out in Appendix J. The minimum acceptable hourly rate of pay for occupation code 1132 was £10.55 per hour, whereas the salary offered to the Appellant was at the rate of £10.34 per hour.

4. The Judge found nothing wrong with this decision, but decided to allow the appeal for the reason that the decision was not in accordance with the law because in making the decision the Respondent had failed to apply her own Evidential Flexibility Policy following the decision in **Rodriguez [2013] UKUT 00042 (IAC)**.

5. At the hearing, Mr Avery argued that the Judge had erred in law. He referred to the grounds seeking leave and pointed out that the validation trial part of the Policy relied upon by the Judge had not been in force at the date of the decision. In any event, the Policy as interpreted in **Rodriguez** had no application because this was not a case where more information might be extracted from the Appellant. There had been nothing overtly wrong with the Appellant's application such as information being omitted.

6. The Appellant was given the opportunity to respond to this submission but did not contend that there had not been an error of law.

7. I find an error of law as argued by Mr Avery. It is the case that the Appellant's application for leave to remain was made and decided after the pilot trial period of the Evidential Flexibility Policy. That trial period expired on 30th June 2011. In any event, this is not a case to which the Policy might have been applied. The Policy only applies where it is apparent to the Respondent that there has been some omission which might be rectified by seeking further information. It does not apply in a case such as this where the information supplied is complete but indicates that the Appellant does not meet the requirements of the relevant Immigration Rule.

8. Having found an error of law, I proceeded to re-make the Judge's decision.

Re-made Decision

9. Throughout these proceedings it has not been contested that the decision of the Respondent was correct in that for the reasons given in the Notice of Decision the Appellant scored insufficient points under Appropriate Salary of Appendix A to HC 395 to meet the requirements of paragraph 245HD(f) again of HC 395. I therefore re-make the decision by dismissing the appeal.

10. The Respondent also decided to remove the Appellant under the provisions of Section 47 Immigration, Asylum and Nationality Act 2006. The Judge correctly found that decision to be not in accordance with the law following the decision in **Ahmadi [2012] UKUT 00147 (IAC)** and that decision has not been impugned in this appeal. I do not set aside that decision.

Decision

11. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law but only as to the Judge's decision under the Immigration Rules. I set aside that decision and re-make it by dismissing the appeal.

Anonymity

The First-tier Tribunal did not make an order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and I also do not do so.

Signed Date

Upper Tribunal Judge Renton