Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/13979/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 28th July 2014	**On 26th August 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS SARAH REBECCA GULICK

Respondent

Representation:

For the Appellant: Mr I Ross of Counsel
For the Respondent: Mr N Bramble, Home Office Presenting Office

DETERMINATION AND REASONS

The Appellant

1. The appellant is a citizen of the United States and born on 18th December 1989 and on 21st January 2014 she made a combined application for further leave to remain in the UK as a Tier 2 (General) Migrant and for a biometric resident permit. She had

previously been granted leave on 20th September to enter the UK as a student until 23rd January 2014.

The Refusal Decision

2. The application was refused on 6th March 2014 under paragraph 245HD of the Immigration Rules as the appellant did not meet the requirement at paragraph 245HD(f) and under Appendix A with reference to Appendix J. The appellant was required to score 50 points under Appendix A (attributes) (which includes 30 points for sponsorship and 20 points for appropriate salary) and to provide the specified documents.

3. The salary included on her certificate of sponsorship was not at the appropriate rate for the job as specified under Appendix A of the Immigration Rules and the Codes of Practice specified at Appendix J of the Immigration Rules.

4. Her certificate of sponsorship stated that her prospective employment most closely corresponded to occupation 2429 on the Codes of Practice under Appendix J.

5. From 6th April 2013 a new policy on rates of pay for "*new entrants and experienced workers*" within the Codes of Practice was introduced.

6. The minimum acceptable rate of pay for a 39 hour working week for the prospective employment for the appellant was £22,500 per annum as stated on occupation code 2429 under the new entrant appropriate salary rate.

7. The certificate of sponsorship stated that her salary would be £21,000 per annum for a 40 hour week which equated to £20,475 per annum for a 39 hour week.

8. As her prospective salary was not at the above minimum rate as specified in the Codes of Practice SOC2010 under the new entrant level she did not meet any exceptions as specified in Appendix O of the Immigration Rules and it was not considered to be an appropriate rate for the job.

9. Therefore no points had been awarded for an appropriate salary and the appeal was refused.

10. First-tier Tribunal Judge Kempton considered the letter from the appellant's employer Caxton dated 20th March 2014 stating that discretion ought to have been exercised differently as the difference in salary was very slight. The salary was set out in the contract with that which the company believed to be a minimum for a Tier 2 worker on UKBA website being £20,300. This mistake had been rectified and the salary was now increased to the appropriate level of £23,250. Judge Kempton extracted from the website an updated page as at 10th April 2014 and this detailed that the occupation code 2429 identified a new entrant's appropriate salary of £20,400.

11. He stated at paragraph 9:

> *"It does appear that there is quite a bit of confusion surrounding these codes and the minimum level of salary. I attach above the salary for a new entrant as at 10th April 2014 for occupation code and the level of salary is now stated to be £20,400. This is yet another figure different to that provided by both the respondent and the appellant's employer. It is clear that the employer's sole intention apart from employing the best candidate for the position which they seemed to think is the case in relation to the appellant is to ensure that the correct level of new entrant's salary is paid. On the basis of the information currently on the gov.uk website, where I found the figures today the appellant's previous salary for 39 hours of £20,475 would in fact have been sufficient.*
>
> *Paragraph 10:*
>
> *Whatever, the level required as at the date of application decision, the appellant and her sponsor employer have always intended that she meets the Immigration Rules and the salary offer was made on the basis of the correct understanding of the Rules. The offer of salary now of £23,250 is well over the minimum and so the appellant does appear to meet the Rules. There was never any intention that the appellant would not meet the requirements of Appendix J."*

Application for Permission to Appeal

12. The respondent made an application for permission on the basis the judge incorrectly relied on the salary for a new entrant as at 10th April 2014.

13. The relevant date is the date of decision 6th March 2014 and at the date of decision the appropriate salary rate was £22,500 specified in Appendix A to the Immigration Rules in force between 25th February 2014 and 6th April 2014.

14. The appellant's certificate of sponsorship stated that her salary would be £21,000 per annum for a 40 hour week which equates to £20,475 per annum for a 39 hour week.

15. As such the prospective salary was not at or above the minimum rate as specified in Appendix J.

16. Thus the Immigration Rules could not be met and the appeal should be dismissed.

17. A response to the appeal was submitted. It was pointed out that the current threshold was £22,500 and the new threshold was in fact reduced from 6th April 2014 to £20,400. It was submitted that the appellant's salary was always intended to be above the minimum threshold required under Appendix J. It was submitted that any error of law was not material given the appeal would have been allowed in any event since the mistake was rectified prior to the hearing date.

18. Permission to appeal was granted by First Tier Tribunal Judge Cruthers.

The Hearing

19. Mr Bramble relied on the grounds for permission to appeal. He pointed out that in Appendix A and further to paragraph 79A the appellant must have a minimum of £20,300 but he also pointed out that at paragraph 79B that the salary must be the appropriate rate for the job as stated in the Codes of Practice at Appendix J. As at the date of decision the relevant rate for the salary was £22,500. He submitted that the judge had gone in the wrong direction and had looked at the current salary level as at the date of the hearing (12th May 2014) rather than the date of decision which was 6th March 2014. A subsequent letter had been provided but further to paragraph 79D no points would be awarded for an appropriate salary if the applicant did not provide a valid certificate of sponsorship reference number with his application. Thus to consider the matter at the date of the hearing was an error of law.

20. Mr Ross produced a screenshot of the website but even though the minimum salary rate which had been followed by the employer referred to £20,300 at the top there was *also* a reference to the appropriate rate for each occupation.

21. Also he submitted there had been a reference to confusion in fact the Immigration Rules were clear.

22. Mr Ross submitted that it was correct that the judge had considered the figures as at the date of the hearing but he pointed out that in fact the salary rate for this post had decreased as opposed to increasing. The employer was not confused and had read the information placed on the website of the Secretary of State and the employer had relied on that information. The judge accepted that the only intention of the employer was to pay the appellant at the correct rate and had acted in good faith and this was a genuine mistake. Mr Ross accepted that as at the date of the application the correct salary was for code 2429 £22,500.

23. Ms Gulick attended the hearing and gave oral testimony indicating that she had undertaken an English literature degree in Scotland and had proceeded to take a Masters degree at University College London. She had a flat and friends in London and was an event coordinator with Caxton a foreign exchange company. They had agreed to keep her job open should she need to return to the States to make a further application but it would be very inconvenient.

24. The relevant Rule is paragraph 245HD(f) and this states that if applying as a Tier 2 (General) Migrant the applicant must have a minimum of 50 points under paragraph 76 to 79D of Appendix A. These were the Rules in force as at the relevant date which is the date of decision of the Secretary of State and that date is 6th March 2014. It is clear in the Rules at Appendix A that Rule 79A states "*No points will be awarded if the salary referred to in paragraph 79 is less than £20,300 per year unless there are various exceptions.*" The appellant did not fulfil the exemptions.

25. In addition to the requirement under paragraph 79A, and this is the point, a further requirement is identified by paragraph 79B and this is as follows:

"No points will be awarded for appropriate salary if the salary referred to in paragraph 79 above is less than the appropriate rate for the job as stated in the Codes of Practice at Appendix J unless the applicant is an established entertainer as defined in paragraph 6 of these Rules".

26. The appellant is not an established entertainer and she wishes to remain in her job as an events coordinator for Caxton Company.

27. The fact is that as the date of decision which is 6th March 2014 a certificate of sponsorship was submitted with the application in accordance with paragraph 79D but identified that the salary would be £20,300.

28. Even the screenshot stated that there was a minimum salary threshold as well as the appropriate rates for each occupation and the relevant salary rate for job 2429 as an administrative professional was £22,500 and this was accepted by Mr Ross. The further letter from Caxton FX presented and confirming that the salary of £23,250 per annum was confirmed was in a letter dated 20th March 2014 and this postdates the decision made by the appellant.

29. As such the appellant cannot fulfil the Immigration Rules.

30. It was unfortunate that she did not obtain effective legal advice from an immigration solicitor and I can accept that the Rules are complicated to understand and may appear harsh but the appellant cannot succeed in her appeal because she has not shown as at the date of either application or decision, even if the rules changed days later, and the relevant date for my purposes is the decision, that she was going to receive the required salary of £22,500.

31. The Supreme Court in **Patel and ors v SSHD** [2013] UKSC 72 reiterated the judgment of Stanley Burnton LJ in **Miah v SSHD** [2013] QB 35 (where an applicant was refused leave to remain as a Tier 2 (General) Migrant at a time when he was two months short of the five years' continuous residence necessary to support a case for indefinite leave to remain under the rules) and confirmed the concept that 'A rule is a rule' and that to be administratively workable the Immigration rules needed to be treated as such.

32. I therefore find there was an error of approach by the judge at the First-tier Tribunal and an error of law which would have made a material difference. I remake the decision and for the reasons given above I dismiss the appeal of Ms Gulick.

Order

The appeal of Ms Gulick is dismissed.

Signed Date 21st August 2014

Deputy Upper Tribunal Judge Rimington