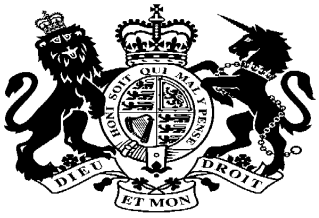

**Upper Tribunal**
**(Immigration and Asylum Chamber)**

Appeal Number: IA/15197/2013
IA/16284/2013
IA/16285/2013
IA/16286/2013

**THE IMMIGRATION ACTS**

| **Heard at Newport** | **Determination Promulgated** |
|---|---|
| **On 9 January 2014** | **On 24 January 2014** |

**Before**

**UPPER TRIBUNAL JUDGE GRUBB**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**RAQUEL PAPA BENDANILLO**
**RENE JAMES CRUZ BENDANILLO**
**JOHN ANDREW PAPA BENDANILLO**
**JOHN PATRICK PAPA BENDANILLO**

Respondent

**Representation:**

For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondents: Mr J Walsh instructed by the Royal College of Nursing

**DETERMINATION AND REASONS**

1. These are appeals by the Secretary of State with permission granted on 4 October 2013 against a decision of the First-tier Tribunal (Judge C J Woolley) which allowed each of the claimants' appeals under Article 8 of the ECHR.

2. For convenience hereafter, I will refer to the parties as they appeared before the First-tier Tribunal. The appellants are a family and are all citizens of the Philippines. The first appellant and second appellant are a married couple born respectively on 28 August 1969 and 12 November 1968. The third and fourth appellants are their

children who were born respectively on 11 April 2006 and 15 November 1992. Both before the First-tier Tribunal and before me, it was accepted that the appeals of the second, third and fourth appellants fell to be determined in line with that of the first appellant.

**Introduction**

3. The first appellant is a "senior care worker". She entered the United Kingdom with entry clearance as a work permit holder in May 2007 and with leave valid from 3 May 2007 until 3 May 2012. The other appellants entered subsequently and were granted leave in line with that of the first appellant. On 2 May 2012, the first appellant applied for indefinite leave to remain on the basis of five years' continuous lawful residence in the UK as a work permit holder under para 134 of the Immigration Rules (HC 395 as amended). The Rules had changed since she came to the UK. The crucial requirement for the appellant was that in para 134(iv) of the Rules which is in the following terms:

> "134. Indefinite leave may be granted on application to a person provided:
>
> (i) he has spent a continuous period of 5 years lawfully in the UK, of which the most recent period must have been spent as a work permit holder (under paragraphs 128 to 133 of these rules)….;
>
> (iv) his employer certifies that he is paid at or above the appropriate rate for the job as stated in the Codes of Practice in Appendix J…"

4. The relevant code for the first appellant's employment is Code 6115 which stipulated that an individual should earn £7.02 per hour and that has subsequently risen to £7.80. The first appellant could not meet that requirement as the hourly rate she was paid by her employer, Oak House Care Home was £6.08 an hour. Consequently, the first appellant's application (and those of the other appellants as her dependents) were refused by the Secretary of State on 19 April 2013 (first, second and third appellants) and 21 May 2013 (fourth appellant).

**The First-tier Tribunal's Decision**

5. Before the First-tier Tribunal Mr Walsh, who represented the appellant, conceded that the appellant could not succeed under para 134 (see para 14 of the determination). Instead, Mr Walsh relied upon Article 8 and the decision of the Upper Tribunal in Philipson (ILR-Not PBS: Evidence) India [2012] UKUT 00039 (IAC). In addition, he argued that the appeal should be allowed on the grounds that the Secretary of State's decision was "conspicuously unfair" and that the appellant had a legitimate expectation that the Rules would not change to the extent that they did so as to disadvantage the appellant.

6. Judge Woolley did not accept Mr Walsh's submission in relation to unfairness and legitimate expectation but found, applying what was said by the Upper Tribunal in Philipson, that the refusal of indefinite leave to the first appellant was disproportionate. It is that latter finding which is challenged by the Secretary of State in this appeal to the Upper Tribunal.

**The Appeal to the UT**

7. The Secretary of State's grounds argue, in essence, that the Judge failed to give any or any adequate weight to the public interest and, in particular to the fact that the first appellant could not meet the requirements of the Immigration Rules which represent an expression of the Secretary of State's policy in controlling immigration. The grounds argue that Judge Woolley failed to consider whether there were "exceptional circumstances" such that a departure from the new rules was justified.

8. Both in the rule 24 reply and in his submissions, Mr Walsh submitted that the Judge had correctly followed Philipson in allowing the appeals under Article 8. He submitted that the new Immigration Rules were not applicable as the transitional provisions bringing into force HC 194 applied. The appellant's application, having been made before 9 July 2012 but decided after that date, was not subject to the application of the new rules, in particular para 276ADE. Mr Walsh also submitted, relying upon the Court of Appeal's decision that there was no 'hard-edged' test of exceptionality.

9. In addition, Mr Walsh relied upon the High Court's decision in R (HSMP Forum Limited) v SSHD [2008] EWHC 664 (Admin) and submitted that the first appellant had a legitimate expectation that the Rules would not be applied to her as someone who entered as a work permit holder so as to impose the salary requirement in para 134(iv) of the Rules which had been introduced since her arrival in the UK. In addition, as I understood his argument, he relied upon a passage in the speech of Lord Neuberger in Odelola v SSHD [2009] UKHL 25 at [57] that it would be unfair, in applying para 134, to apply the salary requirement in para 134(iv).

**Discussion and Analysis**

10. When the first appellant entered the UK as a work permit holder, there was no requirement that she should have a stipulated income. That requirement was introduced in para 134(iv) with effect from 6 April 2011 by HC 863. The rule requires that the individual provide evidence from her employer that her rate of pay was equal to the sum set out in the Tier 2 guidance for the occupation in question. (There was also a change introduced by para 134 in the level of skills required from 2008 but it is common ground that this does not apply to the first appellant).

11. In Philipson, the Upper Tribunal (Blake J, Chamber President) and UTJ Pitt) concluded at [14] that, as originally introduced from 6 April 2011, para 134(iv) could not apply to an individual (such as the first appellant) who had come to the UK under the old work permit scheme rather than under the new PBS one. That was because there was, in the words of Blake J:

> "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."

12. That also was common ground between the parties before me.

13. That, however, changed from 4 April 2012 when the Secretary of State changed her policy such that the salary requirements now applied to those (such as the first

appellant) who came to the UK as work permit holders. That is recorded in a letter from the UKBA dated 4 July 2013 addressed to the Royal College of Nursing (at Tab C96 of the appellant's bundle). There, it is set out that it was the Secretary of State's policy that the appropriate salary rate should apply to work permit holders but "due to a technical omission" in the wording of the Code of Practice that policy was not given effect immediately. The letter continues:

> "To address this technical error, the wording was changed on 4 April 2012 to include all applications from SCWs from that date. In recognition of the previous error, we waved the requirement to be paid £7.02 per hour for applications submitted before 4 April 2012. As this waiver only related to a small number of cases already submitted, and was not available to any new applicants, it was decided not to publish details to avoid confusion."

14. The final comment in that paragraph is perhaps surprising.

15. Consequently, the first appellant's position was that had she applied prior to 4 April 2012, in the light of the view expressed in [14] of Philipson, the first appellant would not have had to satisfy the requirement of para 134(iv). She would, of course, have had to establish under para 134(i) that she had been in the UK lawfully for five years as a work permit holder and that she could not have done until 3 May 2012. Nevertheless, on the assumption (not unreasonably) that an application made shortly before 4 April 2012 would not be decided until after 3 May 2012 had the first appellant made such an application it would undoubtedly have been successful. However, because she made her application on 2 May 2012 the "lacuna" caused by the technical omission did not apply to her and hence, given that she was paid less than £7.02 per hour she could not succeed under the Rules.

*Legitimate Expectation*

16. Although it is raised by way of reply by Mr Walsh, I will deal first with his argument that the first appellant should have succeeded on the basis that she had a legitimate expectation that the Rules would not be amended adversely so as to prevent her, after five years lawful residence as a work permit holder, being able to successfully apply for indefinite leave.

17. The normal position is that, as expressions of the Secretary of State's policy, the Immigration Rules maybe changed using the negative resolution procedure in the House of Commons at any time and that, subject to transitional arrangements, an individual's application is to be determined by the Rules in force at the date of the Secretary of State's decision. That is the position affirmed by the House of Lords in Odelola. In Odelola, the House of Lords rejected the argument that an individual had a vested right which entitled them to have an application under the Rules decided on the basis of the Rules in force at the date of application. At [39], Lord Brown said this:

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

18. I did not understand Mr Walsh to dispute this proposition. It means, in my judgement, in principle that the first appellant in order to succeed under the Immigration Rules had to meet all the requirements of para 134 including the salary requirement in para 134(iv). There were no transitional provisions applicable to her. What Mr Walsh submits is that by way of exception to that proposition the first appellant can show that she (as a person who entered as a work permit holder) has a legitimate expectation that the rule will not change unfavourably to her, in particular, by imposing the salary requirement in para 134(iv). Mr Walsh relies upon the HSMP Forum Limited case and, in his submissions, drew my attention in particular to paras [52]-[54] of the judgement of the High Court.

19. There, the High Court was concerned with a change in the Highly Skilled Migrant scheme which resulted in changes which reduced or took away an individual's opportunity to apply for settlement (that is ILR under the scheme). To that extent, the case has similarities with the present one. However, the basis upon which the High Court accepted that the legitimate expectation relied upon in the HSMP Forum Limited case was established, is drawn out in paras [55] and [56] as follows:

> "55. But the guidance went further. The January 2002 guidance stated that even if the programme was suspended:
>
> > "those already in the United Kingdom, as Skilled Migrants, will continue to benefit from the programme's provisions."
>
> The later guidance stated in answer to the question "What if the scheme changes?" and "I have already applied successfully under the HSMP. How does the revised HSMP affect me?"
>
> > "A. Not at all. It is important to note that once you have entered under the programme you are in a category that has an avenue to settlement. Those who have already entered under the HSMP will be allowed to stay and apply for settlement after 4 years' qualifying residence regardless of revisions to HSMP."
>
> 56. It can be said (indeed it was emphasised) that the revisions did not touch the extension and settlement criteria and that that statement cannot be read as applying to such revisions. I am not so much influenced by the reference to "revisions" as I am by the "important …note" in general terms: "…once you have entered… you are in a category that has an avenue to settlement". This seems to me to accurately describe the character and intended manner of operation of the scheme."

20. At [57] Sir George Newman concluded:

> "57. I find that the terms of the scheme, properly interpreted in context and read with the guidance and the rules, contain a clear representation, made by the defendant, that once a migrant had embarked on the scheme he would enjoy the benefits of the scheme according to the terms prevailing at the date he joined.

21. In the HSMP Forum Limited case, the legitimate expectation was based upon both the context and statements made in guidance (set out at [55] of the judgement) which, in effect, promised to those who had entered under the old scheme that changes would not affect their "avenue to settlement". Mr Walsh has not pointed to

any such statement made either to the first appellant or more generally to work permit holders. A legitimate expectation requires, in the words of Bingham LJ in R v IRC Ex part MFK Underwriting Agents Limited [1990] 1 WLR 1545 at 1569G-H that:

> "the ruling or statement relied upon should be clear, unambiguous and devoid of relevant qualification."

22. That approach was affirmed by the Privy Council in Paponett and Others v Attorney General of Trinidad and Tobago [2010] UKPC 32 at [28]-[30] *per* Lord Dyson.

23. No such clear, unequivocal and unambiguous statement has been identified or relied upon in this appeal.

24. As regards 'context', identified as an important factor in the HSMP Forum Limited case, Mr Walsh candidly accepted that Sir George Newman at [33]-[35] of the HSMP Forum Limited put the position of work permit holders in a less favourable category as regards settlement. At [34], Sir George Newman said:

> "34. In my judgement, leave to remain pursuant to a Work Permit cannot be compared favourably with the individual migration route which is available to those under the HSMP. "

25. At [36] he refers to the work permit scheme as "a significantly less advantageous scheme". At [33], Sir George Newman remarked that:

> "33. Whilst families can reside with the holder of the work permit, the status carries considerable uncertainty and potential for disruption to family life."

26. In my judgement, Judge Woolley was entirely correct to conclude that the appellant could not succeed on the basis of establishing a "legitimate expectation" such that the first appellant could succeed in her claim for ILR despite the change in para 134(iv).

*Fairness*

27. Whilst Mr Walsh sought to rely, as he had for Judge Woolley, upon the notion of "conspicuous unfairness", in my judgement that is properly a matter to be considered in the application of Article 8. Mr Walsh's reliance upon [57] of the speech of Lord Neuberger in Odelola cannot, in my judgement, demonstrate that Judge Woolley erred in law. At [57], Lord Neuberger said this:

> "57. The notion that the unfairness of a change in the Rules applying to existing applications can be taken into account when deciding if they do so apply, even if no vested right is involved is also supported by a passage, cited with approval in *Wilson* [2004] 1 AC 816, para 200, from the judgment of Staughton LJ in *Secretary of State for Social Security v Tunnicliffe* [1991] 2 All ER 712, 724. He said that it was "not simply a question of classifying an enactment as retrospective or not retrospective", but that "it may well be a matter of degree – the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended". The fact that the weight to be given to the presumption varies in this way assists the conclusion that one can take into account the fairness of the result when

> considering whether an amendment applies to existing applications, even where no vested right is involved."

28. Mr Walsh cannot have it both ways. He clearly accepted before Judge Woolley that the appeal could not be allowed under para 134 (see para 14 of the determination). As a free standing method of interpreting the application of para 134(iv), therefore, Mr Walsh cannot now rely upon unfairness so as to identify an error in the judgement such that the appeal should have been allowed as not in accordance with the Immigration Rules under which, it was accepted before Judge Woolley, the first appellant could not succeed. In any event, beyond the 'legitimate expectation' argument, I am unable to see any conspicuous unfairness or, indeed, any basis upon which para 134 can be interpreted so as to exclude its application to the first appellant.

29. Consequently, the crucial issue in this appeal is whether Judge Woolley's decision allowing the appeal under Article 8 can stand.

*Article 8*

30. The Judge dealt at length with Article 8 at paras 32-37 of his determination. He accepted that the appellants had established private and family life in the UK. However, as they would be returning to the Philippines as a family there would be no breach of their family life but, he found, that over the "last six years" the appellants have "put down considerable roots" and that their removal engaged Article 8.1. No challenge is brought to that finding.

31. Having found that any interference would be in accordance with the law (para 35) and that the removal would be for a legitimate aim, at para 37 Judge Woolley dealt with the issue of proportionality. In para 37 he noted that:

> "There is no requirement for me to apply any test of 'exceptionality' but rather to 'strike a fair balance between the rights of the individual and the interest of the community which is inherent in the whole of the Convention".

32. That self direction is entirely in accordance with the Article 8 case law, in particular Razgar v SSHD [2004] UKHL24 and Huang v SSHD [2007] UKHL 11. In finding that the interference with the appellant's private life would be disproportionate, Judge Woolley relied heavily upon the Upper Tribunal's decision in Philipson. Judge Woolley first set out from [20] of the Upper Tribunal's determination as follows:

> "20. …there was in our judgment private life established in this country when the claimant and her family had relocated from India on the understanding and belief that she was being admitted under a rule what would allow them to remain indefinitely in the United Kingdom. She had an expectation of permanent residence in the UK if she continued to meet the conditions of the work permit. In our judgement that was a legitimate and reasonable one having regard to the nature of the rules throughout her stay. Although it was not a legal right or an indefeasible expectation because policy could always change, we would normally expect transitional provisions to be made in the in cases where a person is encouraged to leave their own country to take on a demanding and very low paid job as a care assistant. In our judgment, there was private and family life deserving of respect. The

> question then arises whether interference with it is justified and proportionate."

33. Then, quoting from [24] of the Upper Tribunal's decision, Judge Woolley continued:

> "24. It is trite law that a measure may be a disproportionate interference with a human right if the decision maker has not adopted an alternative means of promoting the aim that is less intrusive on the right: see for example SSHD v Daly [2001] UKHL 26; [2001] 2 AC 532 at [27]. "

34. Judge Woolley then continued:

> "I have found that the Article 8 rights of the appellant and her dependents are engaged. The legitimate public end is identified is the maintenance of a firm and orderly immigration policy so as to protect the economic and social fabric of the country. Against this must be weighed the rights of the appellant and her dependents to the private life which they have established since their arrival in the United Kingdom. I have accepted that this private life is of long standing and is very considerable. The appellant has performed, and continues to perform, a very valuable role n the community in helping to look after the elderly. I accept that there is a shortage of skilled carers in this field, not least because of the very low wages on offer. Although she does not meet the required wage under the code she has always met the minimum wage conditions. I quote the words of the President in **Philipson** which are equally apposite here "having admitted her at a certain wage level and led her to believe that settlement was probable at the end of the five year period, it is very harsh to refuse her because of a recent change of policy that operated on employers and not employees. A less intrusive means of promoting the legitimate aim of maintaining reasonable wage levels in the industry would be to require the employer to improve the wage or to permit the appellant to move to another employer willing to pay the increased wage". It is in this respect that Mr Walsh's submissions have their full force. The Home Office, somewhat astonishingly, have admitted that the rule change was not made public because of the likely confusion it might cause. Had the proposed rule change been published in advance, however, then the steps which the President has mentioned could have been planned and prepared for so as to allow the appellant to meet the wage requirements. I have no doubt that as an experienced carer that the appellant would have found employment paying the wage of £7.80 an hour, particularly if she was working up to the grade of senior carer, or that her employers would not have been prepared to raise her wages to this level if they had wanted to keep her. I find that the interference with the private life of the appellant and her dependents is disproportionate to the legitimate aim identified. I find that the second, third and fourth appellants are entitled to be classed as her dependents and that the private life of them all is involved if the private life of the first appellant is breached. I find that the balance comes down in favour of their rights as against the principle of legitimate immigration control as applying in this case in furtherance of the economic and social wellbeing of the United Kingdom. I find that the interference with the appellants' rights to a private life is of such a level as to breach those rights."

35. The facts of Philipson were strikingly similar to those of the present appeals. There, as in these appeals, the claimant was admitted under a work permit valid for five years and throughout nearly the whole of her stay in the UK para 134 was in terms such that she would be entitled to indefinite leave to remain after five years. However, one month before the conclusion of the five year period, the settlement requirements in para 134 were amended to impose a "novel requirement of a wage that met the minimum set out in guidance to Tier 2 Sponsors" ([16] of Philipson). At [17], Blake J commented:

> "17. The intrinsic lack of justice in this case comes from the attempt at the 59th month of her 60 month stay, to impose wage conditions on her that were irrelevant to the original grant of the work permit."

36. In fact, in Philipson the Upper Tribunal allowed that appellant's appeal under para 134 on the basis of evidence that the appellant's employer had backdated a rise in her wages that met the requirement in para 134(iv). The Upper Tribunal, as a result, specifically indicated that it did not need to make any decision on that appellant's Article 8 claim. However, the Upper Tribunal gave a clear indication of the approach that should be adopted in cases of this sort. At [22] the Upper Tribunal said this:

> "22. …Controlling immigration is not a legitimate aim in itself but is certainly a means to protecting the economic and social order and the rights of others. However there was nothing in the immigration rules or generally to suggest that the claimant or her family threatened economic or social disorder or did not qualify for settlement."

37. Then at [24] the Upper Tribunal dealt with the situation where the individual could not show that she met the wage requirement as follows:

> "24. Even if her employer had refused a wage increase or refused to back-date it to the period before the decision of the Secretary of State in question, we would have wanted to explore with some care whether there was a legitimate aim for refusing her application. She met the statutory minimum wage conditions. She had performed and was continuing to perform a valuable social service in a field of employment in which there are labour force shortages given the low level of wages. Having admitted her at a certain wage level and led her to believe that settlement was probable at the end of the five year period, it is very harsh to refuse her because of a recent change of policy that operated on employers and not employees. A less intrusive means of promoting the legitimate aim of maintaining reasonable wage levels in the industry would be to require the employer to improve the wage or to permit the appellant to move to an another employer willing to pay the increased wage."

38. That was the reasoning, of course, that Judge Woolley adopted and applied to these appellants so as to conclude that the Secretary of State's decision was not proportionate. In my judgement, Judge Woolley was fully entitled to apply what was said in Philipson and reach the conclusion that he did. The balance that he struck against the Secretary of State and in favour of the appellants was not irrational or otherwise unlawful.

39. That said, I must deal with the grounds relied upon by Mr Richards and, in particular, the argument that the Judge erred in law because he did not take into account that the appellant could not meet the requirements of the "new" Article 8 rules and did not apply a test of "exceptional circumstances".

40. The argument that the Judge was required to apply the new Article 8 rule is, in my judgement, untenable. It is accepted by Mr Richards that the Rules cannot be directly applied in this case. That is because the first appellant's application was made before 9 July 2012 and so, by virtue of the transitional provisions, the new rules did not apply. That is, presumably, why the Secretary of State did not seek to

apply the new rule in her decision letters in respect of each of the appellants. Nevertheless, it is said by Mr Richards that at the date of the hearing before Judge Woolley the new rules did represent the Secretary of State's policy in relation to Article 8 and, in particular, respect for private life and, therefore, had to be taken into account by the First-tier Tribunal in determining whether the public interest outweighed the private life of the appellant. With respect, that in my judgement directly contradicts the purpose of the transitional provisions. The Secretary of State cannot, on the one hand say that the Rules should not be applied and, on the other hand state that they reflect her policy on Article 8 and are therefore relevant in the proportionality assessment. The transitional provisions mean that the "new" rules dealing with Article 8 issues simply were not the applicable policy of the Secretary of State in applications made before 9 July 2012 but decided after that date. I, therefore, reject the argument that the Judge should consider (and indirectly apply) the new rules, in particular in these appeals para 276ADE, in assessing proportionality.

41. In any event, even if that is not correct, I do not accept the argument that the Judge was required to apply an "exceptional circumstances" test. As the Court of Appeal makes plain in MF (Nigeria) v SSHD [2013] EWCA Civ 1192 at [44]:

> "We would, therefore, hold that the new rules are a complete code and that the exceptional circumstances to be considered in the balancing exercise involved the application of a proportionality test as required by the Strasbourg jurisprudence. We accordingly and respectfully do not agree with the UT that the decision maker is not "mandated or directed" to take all relevant Article 8 criteria into account……"

42. The point being made is that, even where the new rules apply, the requirement of "exceptional circumstances", whether in relation to deportation and found in para 399 or in other cases by virtue of the Secretary of State's policy (see R(Nagre) v SSHD [2013] EWHC 720 (Admin)), does no more than reflect the proportionality exercise mandated by the Strasbourg case law. It was, of course, that which was applied by the Upper Tribunal in Philipson and by Judge Woolley in this appeal. In other words, the Secretary of State may have enshrined her policy in the new rules but that does no more than manifest in that form the factors relevant to, and the process of assessment inherent under, Article 8.2.

43. Further, it is not entirely clear what real weight could be attached to the fact that the appellant did not meet the requirements of para 276ADE as they had only been in the UK for five years. The new rules simply do not deal with the particularity of the first appellant's claim, like that in Philipson, based upon the "intrinsic lack of justice", it was that "injustice" (or "unfairness" as Mr Walsh put it) which informed the approach of the Upper Tribunal in Philipson and Judge Woolley in this appeal.

44. In my judgement, Judge Woolley properly directed himself and was entitled to conclude that, in the particular circumstances of the appellants the interference with their private life was disproportionate. The suggestion in the grounds that Judge Woolley wrongly took into account as "determinative" the fact that the Secretary of State had delayed by one year in reaching a decision on the first appellant's application is, with respect, without merit. It is clear on reading para 36 that, consistent with EB (Kosovo) v SSHD [2008] UKHL 41, Judge Woolley took into

account that delay (not attributable to the appellant) had resulted in "deeper roots in the community than otherwise" and that this will "strengthen an Article 8 claim".

**Decision**

45. For these reasons, the decision of the First-tier Tribunal to allow the appellants' appeals under Article 8 did not involve the making of an error of law. The First-tier Tribunal's decisions stand.

46. The Secretary of State's appeal to this Tribunal is, therefore, dismissed.

Signed

A Grubb
Judge of the Upper Tribunal

Date: