Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/49113/2013

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On 18 November 2014	**On 9 December 2014**

Before

Deputy Upper Tribunal Judge Pickup

Between

Azhar Mahmood
[No anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Mr M Aslam, instructed by Whitefield Solicitors Ltd
For the respondent: Mr A McVeety, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Azhar Mahmood, date of birth 4.4.70, is a citizen of Pakistan.

2. This is his appeal against the determination of First-tier Tribunal Judge Bruce promulgated 2.4.14, dismissing his appeal against the decisions of the respondent, on 22.10.13 to refuse his application for indefinite leave to remain pursuant to paragraph 134 of the Immigration Rules, and on 4.11.13 to remove him from the UK pursuant to section 10 of the Immigration and Asylum Act 1999. The Judge heard the appeal on 1.4.14.

3. First-tier Tribunal Judge Zucker granted permission to appeal on 28.4.14.

4. Thus the matter came before me on 18.11.14 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Bruce should be set aside.

6. The lengthy history is summarised between §2 and §7 of the decision of the First-tier Tribunal. It is the third decision of the Secretary of State to refuse ILR on 22.10.13 and on 4.11.13 to remove him from the UK.

7. The grounds of appeal run to some 35 paragraphs and include submissions that the judge misunderstood the facts and applied guidance which did not apply.

8. In granting permission to appeal, Judge Zucker stated that the "cumulative effect of of the errors identified, if made out, mean that it is arguable that the judge had materially erred. All grounds may be argued."

9. The issue in the appeal was whether the appellant met all the requirements of paragraph 134 of the Immigration Rules at the date of decision. This paragraph sets out the requirements for ILR as a work permit holder, on the basis of having accumulated 5 years continuous lawful residence, of which the latter part must be with leave as a work permit holder.

10. Judge Bruce found that whilst the appellant had completed 5 years, his leave had expired at the date of his application by more than 28 days. The judge went on to consider the submissions about policy which enabled a period in excess of 28 days to be disregarded in certain circumstances, but found that the reasons for delay were not consistent with the policy. However, the requirement that the applicant must not be in breach of UK immigration laws was only inserted on 1.10.12, with savings for applications made but not decided before 9.7.12. Thus at the date of application, there was no such requirement. However, at §12 the judge noted that the parties had agreed by consent that the relevant version of Rule 134 to be applied was that in force at the date of decision. Having made such a concession, the judge can hardly be criticised for applying the version of the Rules the appellant's representative had agreed should be applied. However, the version of Rule 134 applicable at date of decision includes the saving provision for applications made but not decided before 9.7.12. In the circumstances, it must follow that there is an error of law on this issue. The breach of immigration rules by overstaying should have been disregarded. However, in the light of the other findings, this error is not material, as it would not have changed the outcome of the appeal.

11. The respondent's case is that the appellant's employment as a take-away chef does not fall within the definition of chef under code 5434 and that it was not credible that the appellant was being paid at the code of practice rate at the date of decision, 22.10.13. At §16 the judge agreed with this submission and did not accept that the

appellant was genuinely paid at the rate suggested; finding the salary had been arranged to make it appear that the appellant is earning the claimed salary when in fact he is giving most of it back to his employer.

12. In his submissions Mr Azlam referred me to the Statement of Intent: Codes of Practice for skilled workers, which sets out that code 5434 applies to chefs, and the Tier 2 shortage occupation list, dated 16.3.11. His argument was that if the occupation was not in the shortage list, the appellant does not need a certificate of sponsorship (COS).

13. §10 of the grounds of application for permission to appeal submitted that code 5434 is the only code applicable to chefs and that the highest salary is required only if the employer is getting the benefit of the shortage occupation list, or issuing a COS. It is submitted that the employer was not relying on the shortage occupation list and did not issue a COS. Mr Azlam relied on the case of Philipson (ILR – not PBS: evidence) India [2012] UKUT 00039 (IAC), which at headnote (iii) doubted that rule 134(iv) applies to those who never needed a certificate of sponsorship with a salary level identified in guidance relating to such certificates. The appellant in that case entered the UK under the old system and not the new PBS one and accordingly never held a certificate of sponsorship.

14. In reply, Mr McVeety pointed out that the letter accompanying the application claimed that the appellant was employed in a shortage skill occupation.

15. Rule 134(iv) was inserted from 6.4.11, before the appellant made his application on 16.6.11. The general rule on decisions on variations of leave are that they are decided under the terms of the Rules in force at the date of decision, unless there is any transitional or saving provision. There were none such in relation to 134(iv), although there are in relation to other parts of rule 134. Philipson is not authority on the issue, as it is clear from §14 that the Tribunal was not deciding that issue; hence why it was only "doubted" and no ruling on the issue was made. The Tribunal in fact proceeded on the assumption that there was an appropriate salary rate for the claimant's job.

16. As noted above, the appellant's representative had agreed that Rule 134 at formulated at the date of decision contained the relevant requirements. Rule 134 does not specifically require a COS, only that the sponsoring employer certifies that the appellant is still required for the employment in question and that he is paid at or above the appropriate rate for the job as stated in the codes of practice. However, 134(iv) does require the job to be paid at or above the rate for the job in the codes of practice.

17. The appropriate rate for the job is as set out in code 5434, depends on the kind of chef, of which there are 3: A skilled chef as defined in the shortage occupation list; a new entrant chef; and other chef (experienced). The shortage occupation list as of 16.3.11, which is the SOC, states that only the defined job will meet the code, which is a skilled chef where, inter alia, the job is not in a fast food outlet or an establishment that provides a take-away service. The appellant was employed in a take-away establishment, as found by the judge, which is outside the shortage occupation code.

The SOC states that no other type of chef or cook comes within code 5434. In other words, a new entrant chef or other experienced chef does not meet the requirements of Rule 134(iv). Even a skilled chef, where he is earning less than £28,260 or working in a take-away or fast food establishment, does not meet the requirements of rule 134(iv). On the findings of the First-tier Tribunal the appellant failed on both limbs of this requirement. I find the decision of the First-tier Tribunal on this issue at §17, to be correct, and inevitably, the appeal could not succeed for the reasons stated. Any error as to the actual salary level required was not material, as the judge found, for good reasons that his true salary fell far short.

18. The grounds also submit that the appeal should have been allowed under article 8 ECHR. It is clear that the appellant did not claim to have any family life in the UK. In respect of private life between §20 and §22 the judge considered the appellant's private life claim, first under paragraph 276ADE of the Immigration Rules, which his representative conceded he could not meet, and then outside the Rules. The judge proceeded in §20 to consider the question of proportionality, accepting for that purpose that the appellant had a private life and that the decision to remove him would be an interference with that private life sufficient to engage article 8(2) ECHR.

19. It is clear that the judge carefully considered the factors for and against the appellant in the proportionality balancing exercise, including that he would have come to the UK with the intention and hope that his work permit would lead to settlement. However, it was doubtful that he ever worked in accordance with the terms of his leave as to salary level and thus could not have had any legitimate expectation of being able to remain. In my view, the judge reached the inevitable conclusion that the decision to remove him was not disproportionate to the appellant's private life in the UK.

Conclusion & Decision:

20. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal remains dismissed.

Signed: Date: 3 December 2014

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: the appeal has been dismissed and thus there can be no fee award.

Signed: Date: 3 December 2014

Deputy Upper Tribunal Judge Pickup