Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: IA/21495/2014**
IA/50906/2014

THE IMMIGRATION ACTS

Heard at Centre City Tower, Birmingham	**Determination & Reasons Promulgated**
On 21st April 2016	**On 10th May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR BENZHI LIN (1)
JINE JIANG (2)
(ANONYMITY DIRECTION NOT MADE)

Appellants

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr J Walsh, (Counsel)
For the Respondent: Mr D Mills, (HOPO)

DETERMINATION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Higgins, promulgated on 13th January 2015, following a hearing at Taylor House on 13th January 2015. In the determination, the judge dismissed the appeal of the

Appellants, following which the Appellants applied for, and were granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellants

2. The Appellants are husband and wife. They are nationals of China. The first Appellant, who is the principal Appellant, is the husband, and he was born on 21st August 1978. The second Appellant, who is his dependant, was born on 19th September 1982. The first Appellant came to the UK on 3rd November 2008 with entry clearance to work as a work permit holder and his wife joined him on 17th August 2010 some two years later with entry clearance as his dependant. Before the expiry of the Appellant's leave, he applied for indefinite leave to remain. This application was refused on 28th April 2014 and the Appellant appeals that decision.

The Appellant's Claim

3. The Appellant's claim is that he has satisfied the requirements for indefinite leave to remain and that the decision of the Respondent is not in accordance with the law, insofar as his application has been rejected. The Appellant was told that he could not comply with the requirements of paragraph 134 of HC 395 which was to the effect that the Appellant can be granted ILR provided that certification from his employer can confirm that he is paid at or above the appropriate rate for the job as stated in the Codes of Practice.

4. The Appellant maintains that he has never been able to provide a certification from the employer to this effect. However, he relies upon the Upper Tribunal's determination in **Phillipson (ILR – not PBS: evidence) India [2012] UKUT 00039**. The Appellant states that the relevant requirements in this case are not the requirements in the current regime of paragraph 134. The relevant requirements are in the version of paragraph 134 which had been in force when he had been granted entry clearance as a work permit holder. Previously before paragraph 134 existed in 2008, the position was that an applicant for indefinite leave to remain simply had to show that he had spent a continuous period of five years lawfully in the UK, and that he had complied throughout with the requirements to which he is subject as a work permit holder, and his employer had certified that his services were still required and he had sufficient knowledge of the English and a better life in this country.

5. The Appellant contended that he met those requirements. The additional requirement now imposed that he be paid at or above the prescribed rate for the job had been included only in the Rules with effect from 6th April 2011 and it was not a requirement that he had to meet. The Secretary of State in the refusal letter contests this version of the law and argues that the general principle is that an application for a variation of leave to remain is determined on the basis of the Rules in force when the Respondent's decision is made. The Appellant had had ample time to ensure that the requirement was met before the Respondent refused his application in April 2014.

The Judge's Findings

6. The judge heard argument from Mr Walsh of Counsel (who appears before this Tribunal today as well) that if one considers HC 863, which introduced the requirement in paragraph 134(iv) and (v) with effect from 6th April 2011 of having to provide certification of an applicant being paid at or above the appropriate rate for the job, that is accompanied by a copy of an explanatory memorandum, and HC 863 expressly provides that an application for leave to remain made before 6th April 2011, but which had not been determined by that date, will be decided in accordance with the Rules in force on 5th April 2011. So far as the memorandum was concerned, two bullet points in paragraph 7.12 were relevant for the present purposes. Work permit holders were entitled to apply to extended leave to remain up to a total of five years. Mr Walsh argued that, "as a transitional arrangement" applicants for extension of their leave to remain as work permit holders would not be subject to the new salary thresholds.

7. The judge observed how in **Phillipson**, where the applicant had applied for indefinite leave to remain very shortly after 6th April 2011, her application had been refused in June 2011 because the pay she was receiving was less than the rate prescribed for the job she was doing, and she appealed and in support of her appeal she had submitted a letter from her employer confirming that it had awarded her a pay rise sufficient to meet the requirements in paragraph 134(iv) and it had backdated the pay rise to a date before the refusal of the applicant's application. The Upper Tribunal ruled that the decision the Appellant had appealed had not been made under the points-based system. It had been made in response to an application for indefinite leave to remain. Therefore, the employer's letter had been admissible, even though it had not been put before the Secretary of State prior to her decision, and the Appellant succeeded in her appeal. The Upper Tribunal observed (at paragraph 14) that, "as we understand it the claimant never needed a certificate of sponsorship because she came under the old system and not the new PBS one and accordingly never held one.

8. Before the Tribunal, Mr Walsh argued that the uncertainty as to whether work permit holders, such as the Appellant, would be required to demonstrate that they were being paid at a prescribed rate, if and when they made an application for indefinite leave to remain, optimised by the Upper Tribunal's observations in **Phillipson**, had given rise to conspicuous unfairness. In the circumstances the Respondent should be required to grant leave to the Appellant to remain notwithstanding his failure to meet the requirements for indefinite leave to remain under paragraph 134.

9. The judge rejected Mr Walsh's submissions on the basis that the Respondent Secretary of State was entitled to determine the Appellant's application for indefinite leave to remain on the basis of the Rules in force on 28th April 2014 and the requirements of paragraph 134(iv) and (v) had not been complied with by the Appellant. The Appellant had no legitimate expectation that the UK's policy in relation to work permit holders would remain unchanged during the five years that

the principal Appellant would have to send here before he would be entitled to apply for indefinite leave to remain.

10. The judge went on to consider then Article 8 ECHR and rejected the appeal on that basis either because neither Appellant was entitled a grant of leave to remain on the basis of their marriage under Appendix FM of the Rules because neither of them were British citizens or settled here. Paragraph 276ADE did not apply. If the first and second Appellants were removed, together with their son, they will be removed as a single family unit and the family will be kept intact. The decision to remove in these circumstances would be entirely proportionate to the legitimate ends of immigration control that had to be served.

11. The appeal was dismissed.

Grounds of Application

12. The grounds of application state that the judge erred in law in concluding that the salary requirement of the Immigration Rules applied from April 2011. The grounds also assert that the judge wrongly held there to be no legitimate expectation given the conspicuous unfairness in the decision reached against the Appellant. On 7th August 2015, the Upper Tribunal granted permission to appeal. On 3rd September 2015, a Rule 24 response was entered by the Respondent Secretary of State to the effect that the judge's findings were based on the evidence and are supported by clear analysis of the evidence. The conclusions reached by the judge at paragraph 27 were entirely open to him.

Submissions

13. At the hearing before me on 21st April 2016, the Appellant was represented by Mr Walsh, of Counsel, and he made three basic submissions before me.

14. First, that the Appellant's application was rejected on the basis that he had failed to submit evidence from his employer in the form of his sponsorship certificate confirming that he was paid at or above the appropriate rate for the job as stated in the Codes of Practice in Appendix J. However, if one looks at his application form, there is a section 5.5, in which the Appellant has drawn a line to indicate that this is "not applicable" because his application was made on the basis that he had entered the UK under a work permit some five years previously.

15. The case of **Phillipson (ILR - not PBS: evidence) India [2012] UKUT 00039** had made it clear that,

> "the claimant never needed a certificate of sponsorship because she came under the old system and not the new PBS one and accordingly never held one. If there was 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".

16. The judge accepted at paragraph 10 of the determination that the Appellant has not been in a position to comply with the requisite Rule and his solicitors (see paragraph 12) confirmed that the relevant requirements were not requirements in the current version of paragraph 134 as far as this Appellant was concerned.

17. Second, Mr Walsh submitted that if one looks at the "Tier 2 of the points-based system – policy guidance" (which applies "for all Tier 2 applications made on or after 6th April 2016"), there is a provision at paragraph 265 to the extent that,

"You will be exempt from the minimum earnings threshold if any of the following apply to you:

- your most recent grant of leave was as a Tier 2 (Minister of Religion) Migrant;
- your continuous five year period includes all or part of a grant of leave as a qualifying work permit holder, or as a Tier 2 Migrant where your certificate of sponsorship was assigned before 6th April 2011; ...".

Mr Walsh submitted that, again that the Appellant's application was made on 18th October 2013 the Appellant could succeed now because paragraph 265 makes it clear that one is exempt from the minimum earnings threshold.

18. Third Mr Walsh relied upon the case of **HM (PBS - legitimate expectation – paragraph 245ZX(l)) Malawi [2010] 446 UKUT**, where it is stated that,

> "we do not consider that the Appellants are precluded from relying upon the guidance which, though as **Pankina** makes clear, cannot be employed adversely to an Appellant, nevertheless in our view can give rise to a legitimate expectation that the Secretary of State will adhere to that guidance when considering an Appellant's claim" (see paragraph 14).

It was submitted by Mr Walsh, the cumulative effect of the guidance and the explanatory memorandum, which led to a legitimate expectation that the Appellant would not be expected to have to comply with the minimum earnings requirement. At any rate, even if this was not so, as a question of conspicuous unfairness, his appeal should have be allowed in the circumstances of this case.

19. For his part, Mr Mills submitted that at the time that the Respondent Secretary of State made her decision the Immigration Rules had changed and paragraph 134 of HC 395 had stipulated an appropriate levels earning requirement which the Appellant had to comply with. As the judge had said, the Appellant had ample time to comply with this requirement, and if he chose not to do so, then he could not succeed. There was no legitimate expectation but the Rules will not change. The fact was that there was no certificate or sponsorship from the employer as required under the Rules.

20. Second, as far as the case of **Phillipson** was concerned, this was about an applicant who in his 59th month of a 60 month stay, had wage conditions imposed on her, that were irrelevant to the original grant of a work permit (see paragraphs 16 to 17 of

Phillipson) which the Tribunal held indicated an "intrinsic lack of justice". The present case was quite different. There was no question of conditions being imposed at the eleventh hour, such that the Appellant was "unaware" and he had ample time to be able to comply with the Rules, which he had not done. The change in Rules came about some half way through the five year grant of leave that the Appellant had under the work permit system. The Appellant needed a certificate from his employer confirming that he was paid at the appropriate rate. His failure to do so could only have led to one decision. The Rules changed and the Appellant had adequate notice of that change. This was exactly the manner in which the judge had dealt with the Rule change position with respect to the Appellant at paragraph 27 of the determination. The judge was correct to find that the Appellant had no legitimate expectation during his five year work permit leave.

21. Finally, Mr Mills did nevertheless accept that if the guidance in Tier 2 Policy Guidance (version 04/2016) applied and paragraph 265 of that guidance stood to be implemented, then he would have to agree that the Secretary of State would lose in this appeal because this makes it quite clear that, "you will be exempt from the minimum earnings threshold ..." if certain conditions are satisfied.

22. In his reply, Mr Walsh referred to, what he described as an "indulgent concession outside the Immigration Rules" made by the Respondent Secretary of State to the effect that if people are coming to the UK on a work permit around the period of 2010 then they would not be subject in 2015 to Rule changes, such that they will be prevented from applying, as was normally the case, for indefinite leave to remain, after five years' continuous lawful residence in this country. Essentially this would have been unfair and as a question of fairness these concessions have been made and should be applied by the Tribunal now.

23. Second, **Phillipson** could not be limited in the manner submitted by Mr Mills because that case made it clear (see paragraphs 15 to 17) that "the claimant never needed a certificate of sponsorship because she came under the old system and not the new PBS one" and that, "if there was no guidance as to the salary level applicable to her, then Rule 134(iv) would not apply and a claim to settlement should have been granted without more" (paragraph 14).

Error of Law

24. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision (see Section 12(2) of TCEA 2007). My reasons are as follows.

25. First, the Appellant entered on a work permit, whereby he received £16,500 per annum, and the evidence was that his salary reached that level at all material times. On 6th April 2011, HC 863 introduced a requirement that the employer "certifies that he has paid at or above the appropriate rate for the job as stated in the Codes of Practice for Tier 2 Sponsors published by the UK Border Agency". The Appellant did not have a Tier 2 Sponsor. The new requirement could not apply to him. That

this is the case, is confirmed by the explanatory memorandum (at paragraph 7.12) which states that those,

> "who are already in the UK under the Rules in place before 6th April 2011 will be able to apply to extent their stay without being subject to the annual limit, the new guidance level requirement, the new salary threshold, or the new English language requirement. This applies whether they are extending with the same employer or changing employers".

This explanatory memorandum is dated 16th March 2011 and expressly refers to the fact that this exception is promulgated as a "transitional arrangement", with respect to people such as work permit holders and others. The net effect of this was that the Appellant was not caught by the changes that were brought into effect on 6th April 2011 by HC863.

26. Second, that this is a case is confirmed by **Phillipson [2012] UKUT 00039** where the Tribunal held that, "if there was no guidance as to the salary level applicable to her, then Rule 134(iv) would not apply and a claim to settlement should have been granted without more" (see paragraph 14). **Phillipson** had confirmed that the Rule changes on 6th April 2011 by HC 863 did not cover a person on the old work permit system (and had not transferred to Tier 2).

27. Third, the judge observed that in the Rules in 2012 and 2013 an attempt was made to remedy or fill that lacuna, the lacuna being that the Rule changes in 2011 did not catch everyone. However, it remained the case as confirmed by the explanatory memorandum of 16th March 2011 that those who entered the UK as workers before 6th April 2011 were not subject to the salary thresholds contained in the Immigration Rules.

28. Fourth, the judge erred in concluding that the salary requirement applied from April 2011 (see his paragraph 27). This could not be right given that the explanatory memorandum of 16th March 2011 had provided a specific exemption in precisely this kind of case for a person in the Appellant's position who had entered via a work permit.

29. Finally, the judge erred in concluding that there will be no legitimate expectation because the Appellant's case fell to be determined by the Rules then in place. The difficulty with this conclusion is two fold. First, the explanatory memorandum clearly states that persons in the position of the Appellant, who are already in the UK before 6th April 2011, would not be subject to the salary requirement. Second, to subject them to a salary requirement would be unfair in terms of the strictures set out by the Tribunal if **Phillipson** itself was recorded that,

> "the claimant never needed a certificate of sponsorship because she came under the old system and not the new PBS one and accordingly never held one. If there was no guidance as to the salary level applicable to her, then Rule 134(iv) would not apply and a claim to settlement should have been granted without more" (see paragraph 14).

No less importantly, however, is the policy guidance used for all Tier 2 applications made on or after 6th April 2016. In this respect because this makes it clear at paragraph 265 that, "you will be exempt from the minimum earnings threshold if ..." it is the case that, "your continuous five year period includes all or part of a grant of leave as a qualifying work permit holder ...", and this is plainly the case here.

30. In short, this is a case where the Appellant's circumstances fell squarely within paragraph 7.12 of the explanatory memorandum. It did not come within the latest statements that ILR application would have to meet the salary requirement, because this applied to those employed by Tier 2 Sponsors only, and it is agreed by all sides that the Appellant never had a Sponsor, so that the requirement of being employed by Tier 2 Sponsors did not apply. It is well known that policy statements made by a government department can give rise to a legitimate expectation, and are at any rate, expected to be abided by, in the interests of legality and the observation of the rule of law, such that they cannot be arbitrarily resiled from. The policy statement in this case was absolutely explicit and as clear as it could be. All that the Appellant had to show was that he complied with the requirements of the work permit holder at the time, and complied with the salary requirements specified during the work permit grant of permission. There is no question that he has been able to do so throughout. Paragraph 134(iv) would never have applied to the Appellant, and **Phillipson** confirmed that as long ago as 2012, and any amendment to deal with the lacuna in 2012 or 2013 could not obviate the duty upon the public administration to bear in mind the explanatory memorandum of 16th March 2011 and the exemption contained at paragraph 7.12. This fell in the Appellant's favour.

Re-Making the Decision

31. I have remade the decision on the basis of the findings of the original judge, the evidence before him, and the submission that I have heard today. I am allowing this appeal for the reasons that I have set above. This appeal is allowed.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Juss 6th May 2016