Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/12641/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 12 December 2013	**On 12 February 2014**

Before

MR JUSTICE MITTING
UPPER TRIBUNAL JUDGE CRAIG

Between

MS KAROMA DEE SARABIA BRILLANTES

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Seddon, instructed by JCWI (Joint Council for the Welfare of Immigrants)
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a 28 year old citizen of the Philippines. She entered the United Kingdom on 7 July 2011 on a Tier 4 (General) Student visa valid until 12 December 2012. She had enrolled to study on a course in Healthcare Management at level 7 at the Practice Development Unit in Derby and paid for it. She was shabbily treated by

them. The course ended after two months. She then was given a choice, which was not really a choice, of enrolling on a general leadership course of no use to her. Having no viable alternative she went on that course. The Practice Development Unit then closed and went into liquidation. She ended up having paid by her own standards a substantial sum of money for a course or courses that were useless to her and were not in any event completed. Put very bluntly, she had paid a lot of money for nothing.

2. She had a happier time doing the twenty hours' work which her visa permitted as a Senior Care Worker at a care home for elderly patients with dementia rated excellent by the Care Quality Commission. Her employer gave evidence at the First-tier Tribunal hearing which was accepted without reservation by Judge Dearden. She was an excellent care worker who had formed a close and caring relationship with the inmates of the care home.

3. On 10 December 2012 she applied during the currency of her visa for leave to remain as a Tier 2 (General) Migrant. She filled in the requisite form. Her form was however accompanied by a four page letter from the Joint Council for the Welfare of Immigrants drafted by somebody who clearly had a good understanding of the relevant Immigration Rules. Having referred to the various documents that were enclosed to accompany the form as required by the Rules, the author wrote as follows:-

> "We are of course aware that students are not normally permitted to switch in-country into the work category and have advised our client of this. However we believe that there are exceptional circumstances in this case which justify the grant of a Tier 2 visa to Ms Brillantes."

4. There is then set out at somewhat greater length than we have summarised the unhappy experience that the appellant had during her time after her arrival in the United Kingdom. It also referred expressly to the highly favourable view which her employer had formed of her. Under the heading "Tier 2 (General)" the author of the letter wrote:

> "Our client meets the requirements for the position as a senior carer at Chamber Mount and her employer has offered her a full-time position in this capacity subject of course to her being permitted to switch into Tier 2. The Certificate of Sponsorship number is C2G5S14366A. The advertising requirements have been met as confirmed in the COS. Ms Brillantes' salary is £7.80 per hour which is the correct rate as stipulated in the relevant Code of Practice (6115) for senior carers making new applications. Her Diploma in Nursing has been assessed by NARIC in their letter dated 12 November 2012 as being equivalent to an HND qualification in the same subject. We understand that this is the correct skill level for those working as senior carers. However our client also has several years' relevant experience, as she has explained in her statement, including 17

> months in the UK. Ms Brillantes should therefore be granted the necessary 50 points for the COS."

The paragraph went on to state correctly, that she satisfied the remaining requirements of the relevant part of Appendix A.

5. Under an extended passage headed "Secretary of State's Policy towards Senior Carers" the author of the letter referred to a policy introduced by the Secretary of State on 13 August 2007 towards senior carers, which had arisen because of the difficulties experienced by those who run care homes of recruiting suitably qualified and enthusiastic staff. The letter concluded, "for the above reasons we believe that our client, Karoma Brillantes, should be granted a Tier 2 visa".

6. On 2 April 2013 the Secretary of State refused the application. She appealed in time to the First-tier Tribunal. The reasons stated in the decision letter for refusal were that the appellant did not qualify for 50 points for sponsorship for salary and that the work in which she was occupied part-time did not correspond to the list of NQF level 6 occupations and salary adjusted to the full-time equivalent. Her salary was in other words £4,900 a year below the minimum salary threshold of £20,000. Mr Seddon who appears for her below and today conceded that she did not qualify under the Immigration Rules. His claim was put in two alternative ways.

7. First, that the Secretary of State had not considered her application outside the Immigration Rules and secondly that the decision did not give full weight to her right to respect for private life under Article 8 ECHR. The decision letter makes no reference to the exercise of discretion outside the Rules and so does not suggest that any consideration was given to the grant of leave to remain as a result of the exercise of such a discretion. Mr Seddon submitted accordingly that the decision was not in accordance with the law. This is his principal though not only ground of challenge in this appeal.

8. Mr Melvin, the Home Office Presenting Officer submits simply that this was an application made under Tier 2 on a Tier 2 form. Accordingly, the decision-maker was not required to consider the exercise of discretion outside the Rules.

9. The two propositions stated are attractively simple but in fact conceal a number of policy considerations which it is necessary for us to consider.

10. The points-based system was established to permit applications for certain categories of visa to be dealt with in large volume and with a high degree of certainty of outcome. In principle, applicants would know what requirements they had to satisfy. If they satisfied them their application would succeed. If not, it would fail. There are accordingly benefits for applicants for these categories of visa. There are also benefits for public administration: decisions which simply require facts and information to be checked to see whether or not they comply with a detailed list of requirements are easier to administer and execute than those which require the

exercise of discretion. Accordingly, there is an advantage in the saving of cost and in the speed with which applications can be determined and so in the volume which can be determined on a given cost and staffing base. We readily acknowledge that the introduction of the exercise of discretion into that exercise would frustrate its basic purpose.

11. Mr Melvin submits that when a form comes in applying for a Tier 2 visa it goes to a particular division of UKBA which is used to dealing with such applications. It is possible that in the future human intervention in the process may be reduced simply to checking the output of a computer system which has generated automatically the answer. If and when that occurs, the problems which it may throw up will have to be dealt with, initially at least on a case by case basis. But what happens now when an application is made for a Tier 2 visa which on its face makes it clear that the Secretary of State is being invited to exercise a discretion outside the terms governing the grant of a Tier 2 visa and so outside the Rules?

12. One of our member, Judge Craig and Mr Seddon both have previous experience of such applications and of how they are dealt with. Our understanding based on that previous experience is that they are either routinely, or at least frequently dealt with by a decision letter which refers to and so evidences the exercise of a discretion. To take the simplest example, in the case of a hard luck case such as this one which does not fit within the Rules, the application for a Tier 2 visa might be rejected and a decision made often expressed only in a single paragraph that despite the merits of the application the Secretary of State will not exercise a discretion outside the Rules to grant it. As Mr Seddon concedes, that suffices subject always eventually to the rationality and lawfulness of the ultimate decision.

13. Returning to the terms of the letter, the significant parts of which we have set out verbatim earlier in this judgment, it is obvious to us and in our judgment should have been obvious to a human reader in UKBA that it was seeking the exercise of discretion outside the Rules. Both the writer and the reader would have understood from the terms of the passage headed "Tier 2 (General)" that the appellant did not satisfy the requirements of paragraph 245HD(d) or (f) or Appendix A77E(a)(i) of the Rules. What the letter writer was seeking to do was to persuade the reader that if the appellant had had a Tier 2 visa or work permit she would have satisfied the requirements of Appendix A77E(e)(ii) and (iii) and by so doing persuade the decision-maker to exercise discretion.

14. We conclude therefore that on the understanding of practice hitherto, the appellant had the legitimate and reasonable expectation that her application would be treated as one which invited the exercise of discretion outside the Rules and that the decision-maker would understand that he or she was being invited to do so. The absence of any reference to the exercise of such a discretion and so to the inevitable inference that the question was not addressed means that the decision was not in accordance with the law. We have explained our reasons for arriving at that conclusion before we have set out how the issue was dealt with in the First-tier

Tribunal for the simple reason that it was not dealt with at all. We have been shown Mr Seddon's skeleton argument presented to the First-tier Tribunal which in paragraph 34 makes it clear that the submissions he was making to us were also being made to the First-tier Tribunal. This was a case in which there were many issues, some of which were decided in favour of the appellant and it is no criticism of Judge Dearden to say that he may not have fully appreciated with the clarity with which it is being presented to us what the point that is now determinative was. He appears to have treated it as if it were an appeal founded on Article 8 ECHR. That is the second round of challenge to his decision. We can deal with this rapidly and in a manner that we anticipate is uncontroversial.

15. Mr Seddon submits that the appellant's private life was "engaged" in the portmanteau word. So indeed it was, but on the facts of this case viewed from the point of view of her own private life, it go nowhere near a viable Article 8 claim, that is to say a viable claim that the decision should be set aside as unlawful because it failed to show proper respect for her right to family life. The Secretary of State in a policy set out in the Immigration Rules approved by Parliament has, as Judge Dearden observed set the parameters for most cases in which Article 8 is in issue. It is quite unnecessary for us to enter into the currently active debate about whether or not that has been fully achieved. All it is necessary for us to observe is that which we have done that as a freestanding Article 8 claim based on her own circumstances this gets nowhere near to providing her with a ground of appeal which could not properly have been rejected.

16. Mr Seddon puts it on a yet further and alternative basis that because the inmates of the care home in which she works have formed such a close relationship with her that their private life would be engaged by a decision to take her away from them, their Article 8 rights come into play. This in our judgment is an exorbitant expansion of the principle established in relation to close family members **Beoku-Betts [2008] UKHL 39** and we decline to make that extension.

17. This is one of the rare cases in which we consider it necessary not merely to allow the appeal but to issue a direction to the Secretary of State. We do so not to make her task more difficult but to focus the mind of her officials on exactly what is required on the facts of this case. We direct that UKBA considers within such reasonable time as will be proposed to us the application of the appellant for leave to remain outside the Rules. That is the only decision which the Secretary of State is required to re-take.

Signed Date

Mr Justice Mitting