



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

Ferrer (limited appeal grounds; *Alvi*) [2012] UKUT 00304(IAC)

THE IMMIGRATION ACTS

Heard at Field House

On 4 April 2012

**Determination
Promulgated**

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Before

**UPPER TRIBUNAL JUDGE STOREY
UPPER TRIBUNAL JUDGE PETER LANE**

Between

MARIA ROSARIO CABRERA FERRER

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Watterson, Counsel, instructed by Joseph Thaliyan Solicitors

For the Respondent: Mr J Parkinson, Senior Home Office Presenting Officer

(1) In deciding an application for permission to appeal the Upper Tribunal against the decision of the First-tier Tribunal, Immigration and Asylum Chamber, a judge of that Chamber should consider carefully the utility of granting permission only on limited grounds. In practice, such a limited grant is unlikely to be as helpful as a general grant, which identifies the ground or grounds that are considered by the judge to have the strongest prospect of success. In this way, the judge identifies the likely ambit of the forthcoming Upper Tribunal proceedings, which – if that Tribunal concurs – can then form the backdrop for the Upper Tribunal’s subsequent case management directions.

- (2) *Where the First-tier Tribunal judge nevertheless intends to grant permission only in respect of certain of the applicant's grounds, the judge should make this abundantly plain, both in his or her decision under rule 25(5) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and by ensuring that the Tribunal's administrative staff send out the proper notice, informing the applicant of the right to apply to the Upper Tribunal for permission to appeal on grounds on which the applicant has been unsuccessful in the application to the First-tier Tribunal.*
- (3) *If an applicant who has been granted permission to appeal to the Upper Tribunal on limited grounds only applies to the Upper Tribunal on grounds in respect of which permission has been refused, the Upper Tribunal judge considering that application should not regard his or her task as merely some form of review of the First-tier Tribunal's decision on the application.*
- (4) *Whatever may be the position in other Chambers of the Upper Tribunal, in the Immigration and Asylum Chamber the overriding objective of the Tribunal Procedure (Upper Tribunal) Rules 2008 is unlikely to be advanced by adopting a procedure whereby new grounds of appeal can be advanced without the permission of the Upper Tribunal under rule 5 of those Rules.*
- (5) *The test enunciated by the Supreme Court in Alvi [2012] UKSC 33, for deciding whether material not contained in immigration rules can be relied upon by the Secretary of State in making decisions on the grant of leave to enter or remain, probes deeper than the "substantive/procedural" test articulated in the wake of Pankina [2010] EWCA Civ 719, in that it articulates what makes a particular provision one that has to be included in immigration rules: namely, does it amount to a condition of succeeding under those rules? However, there may still be difficulties in determining whether a particular requirement amounts to such a condition or is merely a "procedural" requirement.*
- (6) *Applying Philipson (ILR - not PBS: evidence) [2012] UKUT 00039 (IAC), where the provisions in question are ambiguous or obscure, then it is legitimate to interpret the provisions by assuming that Parliament is unlikely to have sanctioned rules which (a) treat a limited class of persons unfairly; and (b) disclose no policy reason for that unfairness.*

DETERMINATION AND REASONS

1. The appellant, a citizen of the Philippines born on 14 January 1965, was given leave to enter the United Kingdom on 23 May 2006 as a work permit holder. The period of her leave was until 15 May 2011 and the conditions attached to that leave included that she should have no recourse to public funds and that the work (and any changes to it) had to be authorised.
2. On 5 May 2011 the appellant applied for indefinite leave to remain in the United Kingdom as a work permit holder. On 30 June 2011 the respondent

made a decision to refuse to vary the appellant's leave to remain for the following reason:-

"In view of the fact that you are currently employed as a Senior Care Assistant with Southern Cross Healthcare and have provided payslips which show that your rate of pay per hour is currently £5.93 and not at the minimum rate of pay as indicated in the codes of practice guidance which stands at £7.02 per hour, the Secretary of State is not satisfied that your employer has certified that you are 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. Therefore your application has been refused."

3. The appellant appealed against that decision to the First-tier Tribunal and on 10 August 2011 her appeal was heard at Stoke-on-Trent by First-tier Tribunal Judge McDade. Then, as now, the appellant was represented by Ms Watterson of Counsel.
4. In a determination dated 23 August 2011, the judge dismissed the appellant's appeal.
5. As in force at the date of decision, paragraph 134 (indefinite leave to remain as a work permit holder) of the Immigration Rules read as follows:-

"134. Indefinite leave to remain may be granted on an 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 with leave as a work permit holder (under paragraphs 128 to 133 of these rules), and the remainder must be made up of any combination of leave as a work permit holder or leave as a highly skilled migrant (under paragraph 135A to 135F of these rules) or leave as a self-employed lawyer (under the concession that appeared in chapter 6, section 1 Annex E of the Immigration Directorate Instructions), or leave as a writer, composer or an artist (under paragraphs 232 to 237 of these rules);
- (ii) he has met the requirements of paragraph 128(i) to (v) throughout his leave as a work permit holder, and has met the requirements of paragraph 135G(ii) throughout any leave as a highly skilled migrant;
- (iii) he is still required for the employment in question, as certified by his employer;
- (iv) his employer certifies that he is paid at or above the appropriate rate for the job as stated in the code of practice for Tier 2 sponsors published by the UK Border Agency, and
- (v) he has sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, in accordance with paragraph 33BA of these Rules, unless he is under the age of 18 or aged 65 or over at the date of his application;

(vi) he does not have one or more unspent convictions within the meaning of the Rehabilitation of Offenders Act 1974”.

6. The First-tier Tribunal Judge’s determination dealt with two matters. First, he considered the submission advanced by Ms Watterson that, since the reason for the refusal of the appellant’s application was that the current appropriate rate for her job with Southern Cross was not at or above that stated in the code of practice, the judgments of the Court of Appeal in Pankina [2010] EWCA Civ 719 in effect rendered the respondent’s reliance on that guidance unlawful. Secondly, the judge dealt with the submission that removal of the appellant, pursuant to the decision to vary her leave, represented a disproportionate interference with the appellant’s private and family life rights under Article 8 of the ECHR.
7. So far as Pankina was concerned, the judge considered that there was a material difference between, on the one hand, requirements contained in guidance to have held funds for certain continuous periods and, on the other, hourly rates for particular jobs. The first such requirements “could have been, but were not, incorporated into the Immigration Rules”. As to the second, “it cannot be expected that regular changes to an hourly rate for example to keep pace with inflation, required changes to the Immigration Rules which would be a frequent occurrence” (paragraph 2). The judge considered that the guidance in question was available to persons in the position of the appellant and that although “it is probable that she had no control over her hourly rate and became increasingly disadvantaged by it such that she was having to work long hours to make a decent wage, this is not the point. The point is that she was required to satisfy the quite transparent requirements and she has failed to do so”.
8. Turning to Article 8, the judge accepted that the appellant would have developed friendships in the United Kingdom over the time that she had been here and that she also had a boyfriend. Her removal would, consequently, constitute an interference with her right to a private life “and ... this interference would not harm, for example immigration control as the Appellant is a valuable member of the UK economy as a tax payer and is performing a useful job”. The fact that the appellant had developed friendships after five years in the United Kingdom did not, however, give her a:

“right to remain in the United Kingdom. As the appellant has not been able to satisfy the Immigration Rules, and as they are there for the legitimate purpose of immigration control, I hold that the Respondent has a perfectly legitimate reason to interfere with the private life that she has developed in the United Kingdom. In all the circumstances I hold such a decision to be proportionate” (paragraph 3; original emphasis).
9. The appellant sought permission from the First-tier Tribunal to appeal to the Upper Tribunal against the judge’s determination. She did so on four grounds. The first contended that the judge had erred in law in holding that Pankina was not relevant to the facts of the present case. In this regard, ground 1 prayed in aid a number of post-Pankina judgments. In R (on the application of English UK Limited) v SSHD [2010] HC 1726 (Admin), Foskett J declared unlawful “the change in minimum educational

requirements of those applying to study English in the UK”, purported to be set out in guidance with the Immigration Rules, on the basis that those requirements operated “to change materially the substantive criteria for entry for foreign students who wish to study English in the United Kingdom” [64]. In R (on the application of the Joint Council for the Welfare of Immigrants) v SSHD [2010] EWHC 3524 (Admin), a Divisional Court found that the interim limits on the number of Tier 1 and Tier 2 migrants, set out on the UKBA’s website but not in Immigration Rules, would – if upheld – frustrate the purpose of section 3(2) of the Immigration Act 1971. Thirdly, and perhaps most analogously; in R (on the application of Hussain Zulfigar Alvi) v SSHD [2011] EWCA Civ 681, the Court of Appeal held that the “governing principle” that jobs for Tier 2 migrants should be at or above NVQ or SVQ level 3 “must be set out in the Immigration Rules if it is to be valid” [40]. Jackson LJ, without deciding the point, commented that “I can see a case for saying that the specification of specific jobs as falling within the paragraph ... is a ‘substantive’ matter rather than a ‘minor’ alteration to the Secretary of State’s practice” [Ibid].

10. Ground 2 asserted that the First-tier Tribunal Judge had, in effect, erred in law in not allowing the appellant’s appeal on the basis that she had a “legitimate expectation that she would be required to earn the salary specified by her Work Permit in order to qualify for indefinite leave to remain”. This ground pointed out that the judge had not addressed the “legitimate expectation” issue advanced on behalf of the appellant, whose case was that the rate of pay she was required to earn throughout her period of leave as a work permit holder was unequivocally indicated on her work permit as £11,500 per annum and that her pay exceeded this minimum figure. Paragraph 134 of the Immigration Rules referred back to paragraph 128(iv), which required that an applicant “does not intend to take employment except as specified in his work permit”. The respondent’s guidance entitled “Technical Changes in Employment” permitted temporary reductions in pay and hours for work permit holders in the current climate, subject to certain conditions; but, if a work permit holder’s salary had risen significantly, that is to say, above normal annual increments or pay awards applied to all or most staff, this change would necessitate a new application under the points-based system. The appellant accordingly contended that her employer had not been at liberty simply to have raised her wages out of line with those paid to other staff.
11. The combination of these provisions created, according to ground 2, a legitimate expectation “that the pay rate she should earn in anticipation of her application for indefinite leave to remain was that salary set out in her work permit, for that particular specified employment, which she was required to undertake for fear of falling foul of paragraphs 128(iv) and 134(ii)”. The appellant’s rate of pay, albeit lower than that required for Tier 2 migrants, had been approved by the respondent as suitable for work permit holders.
12. Furthermore, ground 2 submitted that the relevant set of amendments to the Immigration Rules, which had introduced current paragraph 134(iv), did so with an explanatory note which said that the change was to require “work permit holders applying for leave to remain ... to provide

confirmation that they continue to earn at least the UK appropriate rate for the job they are doing” (Statement of Changes HC 863; explanatory note 7.13). The “appropriate rate” in the case of the appellant was, it was said, determined by the respondent as £11,500 per annum. The statement of changes laid before Parliament on 16 March 2011 did not suggest that the changes to paragraph 134 of the Immigration Rules required employers to raise wages rather than continue to pay the rate indicated when the work permit was issued.

13. For all those reasons, ground 2 submitted that the respondent’s decision was not in accordance with the law, as contravening the appellant’s legitimate expectation.
14. Ground 3 addressed the issue of Article 8. The appellant submitted that, once it was shown that removal in pursuance of the immigration decision would interfere with her Article 8 rights, it was for the respondent to demonstrate that that interference was “lawful, necessary and proportionate to the legitimate aim pursued”. The ground went on to contend that the First-tier Tribunal Judge had failed to engage with paragraph 45 of the judgments in Pankina, insofar as that paragraph bore on the so-called “near-miss” argument. The appellant, it was said, fell short of meeting the Immigration Rules only because her employer had not raised her wages for a period of one month between 6 April 2011 and the date of the appellant’s application on 5 May 2011. This was, of course, on the assumption that – contrary to the analysis in ground 2 – the employer could have acted in this manner without triggering the need for a different kind of application. Nor had the judge taken account of the effects on the appellant of having to be uprooted from the United Kingdom and relocated again to the Philippines “having come to the UK in the expectation of staying in the UK in a category which leads to settlement”. We should add here that, in the light of Miah [2012] EWCA Civ 261, Ms Watterson did not pursue so much of ground 3 as concerned the so-called near-miss argument.
15. Finally, it was contended that the judge erred in assuming at paragraph 3 of the determination that immigration control was, without more, a “legitimate aim”; whereas Article 8(2) sanctioned interference with such rights only in the interests of “national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others”. Here, there was no issue of criminality or other undesirable conduct on the part of the appellant and the importance attached to the “economic wellbeing of the country” was much reduced in a case where, as here, there was no question of the appellant becoming a burden on public funds. The appellant had, in fact, come to the United Kingdom as a response to a “pressing economic need in the UK – until 6 April 2011 when her profession was removed from the shortage occupation list”.
16. On 8 September 2011, a Designated Judge of the First-tier Tribunal granted permission on ground 3 (Article 8) but not on grounds 1 and 2. The Designated Judge considered that ground 1 had “no merit at all” as

the First-tier Tribunal Judge had “pointed out the rule change applicable to this appellant occurred four weeks before she made her application”. The “legitimate expectation” argument in ground 2, according to the Designated Judge, ignored the fact that “guidance is regularly issued to ensure that applicants are not being paid at a lower salary rate than those set out in the code of practice. It was incumbent upon the appellant and employer to ensure that she was paid at the appropriate hourly rate”.

17. In an undated letter received by the Upper Tribunal on 3 October 2011, the appellant’s solicitors contended that they did not agree that the grant of permission to appeal to the Upper Tribunal should be restricted to ground 3, as had been done by the Designated Judge. In the circumstances, the Upper Tribunal treated that letter as an application “to review the grant of permission on limited grounds”. Having done so, Upper Tribunal Judge Storey was “satisfied that the grant of permission should be varied so as to make clear that all three grounds are arguable”. In deciding to accept the letter, rather than an application made in form UT1, the Upper Tribunal noted that the Designated Judge had not helped matters “by not making clear expressly that his grant was on limited or restricted grounds”. Had he made that clear, the grant would have been accompanied by a notice – IA68 – which stated in terms that “you may apply to the Upper Tribunal for permission to appeal on a point of law arising from the First-tier Tribunal’s decision on any ground on which permission has been refused”.
18. At the hearing on 4 April 2012, Ms Watterson applied for, and was granted, permission to amend the appellant’s grounds, so as to add a fourth one. Since the original grants of permission, the Upper Tribunal (Mr Justice Blake, President and Upper Tribunal Judge Pitt), in Philipson (ILR – not PBS: evidence) [2012] UKUT 00039 (IAC) had held, in a case in many respects similar to the present one, that it was doubtful whether paragraph 134(iv) of the Immigration Rules applies to those who never needed a certificate of sponsorship with a salary level identified in guidance relating to such certificates. The fourth ground is, accordingly, to the effect that the appellant in fact met the relevant requirements of the Immigration Rules for indefinite leave to remain as a work permit holder.
19. We shall deal with the issues raised in this appeal in the following order:-
 - (1) Permission to appeal granted on limited grounds only (*paragraphs 20 – 32*).
 - (2) The Pankina issue [and see, now, Alvi [2012] UKSC 33] (*paragraphs 33 – 44*).
 - (3) Legitimate expectation (*paragraphs 45 – 57*).
 - (4) Does the appellant meet the requirements of the immigration rules? (*paragraphs 58 – 63*)
 - (5) Article 8 of ECHR (*paragraphs 64 – 68*).

(1) Permission to appeal granted on limited grounds only

20. So far as relevant, rule 25 (Tribunal's consideration of an application for permission to appeal to the Upper Tribunal) of the Asylum and Immigration Tribunal (Procedure) Rules 2005, reads as follows:-

"25.- (1) ...
(2) ...
(3) ...

(4) Subject to rule 27, the Tribunal must send to the parties -

(a) written reasons for a decision under this rule; and

(b) if the application is refused, notification of the right to make an application to the Upper Tribunal for permission to appeal and the time within which, and the method by which, such application must be made.

(5) The Tribunal may give permission to appeal on limited grounds, but must comply with paragraph (4) in relation to any grounds on which it has refused permission."

21. As has already been noted, when the First-tier Tribunal, Immigration and Asylum Chamber grants permission to appeal to the Upper Tribunal only on limited grounds, a notice (IA68) is (or ought to be) sent with the limited grant, informing the applicant for permission that he or she may "apply to the Upper Tribunal for permission to appeal on a point of law arising from the First-tier Tribunal's decision on any ground on which permission has been refused". A reading of rule 25(4)(b) and (5) of the 2005 Rules makes it evident that form IA68 is the means by which FTIAC ensures compliance with those provisions of the Rules. In the present case, form IA68 was not sent out with the Designated Judge's grant of permission, limited to ground 3. As the Upper Tribunal noted in its grant of permission on grounds 1 and 2, the Designated Judge failed to make clear that his grant was on limited grounds only. Had the Designated Judge done so, the applicant for permission would have realised that, in order to seek permission on grounds 1 and 2, she needed to apply to the Upper Tribunal for permission to appeal on those grounds. As Mr Parkinson indicated on 4 April, the Practice Directions of the Senior President of February 2010 state that the form to be used for applying to the Upper Tribunal for permission to appeal to that Tribunal is that for the time being specified on the relevant website. That is form UT1.

22. It is necessary at this stage to make two general points. First, as the present case illustrates, if on an application for permission to appeal the First-tier Tribunal, Immigration and Asylum Chamber intends to grant permission only in respect of certain of the grounds, then the judge considering that application should make it abundantly plain that this is so, both in his or her decision under rule 25(5) and by ensuring that the Tribunal's administrative staff send out the proper notice (currently IA68)

so as to comply with rule 25(5). It should also be noted that rule 25(4)(a) requires “written reasons for a decision under this rule”, which means that written reasons are required both for granting an application on particular grounds and for refusing the application on particular grounds.

23. Secondly, as a practical matter, the First-tier Tribunal should consider carefully the utility of granting permission only on limited grounds. Given that the effect of any grant of permission to the Upper Tribunal is to set in train proceedings on the case in question in the Upper Tribunal, a grant of permission on limited grounds will not, in practice, often be as helpful to the parties or to the Upper Tribunal as would a general grant of permission by reference to all of the applicant’s grounds, which nevertheless expressly identifies the ground or grounds that are considered by the First-tier Tribunal to have the strongest prospect of success. In this way, the First-tier Tribunal identifies the likely ambit of the forthcoming Upper Tribunal proceedings, which – if that Tribunal concurs – can then form the backdrop for the Upper Tribunal’s subsequent case management directions under rule 5 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (“the Upper Tribunal Rules”). It should also be noted that rule 15(1) (a) and (b) of those Rules expressly enables the Upper Tribunal to give directions as to the issues on which it requires evidence or submissions and the nature of the evidence or submissions it requires.
24. As the present appeal testifies, once permission to appeal to the Upper Tribunal has been granted, either by the First-tier Tribunal or by the Upper Tribunal, the grounds on which such permission has been granted by either or both Tribunals may be amended with the permission of the Upper Tribunal (rule 5(3)(c)) of the Upper Tribunal Rules).
25. In at least some of the jurisdictions falling within the ambit of the Upper Tribunal, the importance of an appellant’s grounds of appeal is, it seems, questionable. Thus in DL – H v Devon Partnership NHS Trust [2010] UKUT 102(AAC) Upper Tribunal Judge Jacobs, in an appeal from the Health, Education and Social Care Chamber of the First-tier Tribunal, rejected “the argument that an appeal is necessarily limited to the grounds in the application on which permission was given and that further permission is required to raise other grounds.” Having regard to the overriding objective in rule 2 of the Upper Tribunal Rules, he found that “as a matter of interpretation, it would not be fair and just to restrict the scope of an appeal to the grounds in the application on which permission was given”.
26. Upper Tribunal Judge Jacobs considered, however, that his interpretation:

“would not allow a party complete freedom to raise additional grounds at will. The Upper Tribunal has ample power to control the issues that will be considered on an appeal. As well as the possibility of giving limited permission, rule 15(1)(a) authorises the Tribunal to give directions as to the issues on which it requires submissions. In an extreme case, the Tribunal may even strike out all or part of a party’s case under rule 8(3). Those provisions should be sufficient to ensure that additional grounds are only considered if that will be fair and just”. [3]

27. In the Immigration and Asylum jurisdiction, we do not consider that the Tribunals, Courts and Enforcement Act 2007, read with the Upper Tribunal Rules, is such as to excuse a party from the requirement to seek and obtain the permission of the Upper Tribunal in order to raise grounds which are not already before the Upper Tribunal. Proceedings in immigration and asylum appeals are considerably more adversarial in nature than in many, at least, of the jurisdictions covered by the Administrative Appeals Chamber. We do not consider that the overriding objective is, in general, likely to be advanced by adopting a procedure in which new grounds can be advanced without the permission of the Tribunal. It should also be noted that, in immigration and asylum appeals, the Upper Tribunal does not have power to strike out the whole or part of a party's case, other than for want of jurisdiction (rule 8(1A) and (2)(a) of the Upper Tribunal Rules).
28. As is made plain at [4] of DL-H, Upper Tribunal Judge Jacobs did, in fact, proceed on the basis that some form of permission, however described, was necessary:
- “Turning to the application of this approach to the circumstances of this case, I consider that it is fair and just to allow the appellant to raise his additional grounds”.
29. Whether, as we consider to be the position, a party needs permission under rule 5 in order to pursue further grounds or, as in the AAC, permission becomes relevant at some other, later stage, in all cases the Upper Tribunal must proceed pursuant to the overriding objective of enabling cases before it to be dealt with fairly and justly. That requirement involves giving due consideration, not just to the position of each of the parties to the appeal, but also to the interests of other parties with cases before the Upper Tribunal, the resolution of which may be adversely affected by a policy of permitting parties to cause delay by raising issues at the last minute and/or pursuing irrelevant or otherwise unmeritorious lines of argument.
30. In describing the way in which the present appellant was permitted to advance grounds 1 and 2 of her grounds of appeal, it will be noted that the Upper Tribunal, in December 2011, treated the appellant's letter to that Tribunal as “an application to review the grant of permission on limited grounds”, leading to a decision that “the grant of permission should be varied” (paragraph 17 above). As can be seen from the foregoing analysis, however, it is not in fact correct to regard the process merely as some form of review of what the First-tier Tribunal has decided on the application. Rather, the procedure involves the applicant who has been unsuccessful in respect of one or more of their grounds making application to the Upper Tribunal for permission to appeal on those grounds.
31. Before leaving the issue of permission to appeal, it is necessary to make one final point. Whatever the grounds on which permission to appeal to the Upper Tribunal has been granted, once the Upper Tribunal has set aside the decision of the First-tier Tribunal, any re-making of the decision under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act

2007 is not necessarily limited by reference to errors of law identified in those grounds, or in any grounds that have subsequently been permitted to be argued, and which have resulted in the decision of the First-tier Tribunal being set aside. Further, the ambit of the re-making task will not necessarily depend on whether an issue has been raised before the First-tier Tribunal.

32. This point emerges from the judgment of the Court of Appeal in Kizhakudan v SSHD [2012] EWCA Civ 566. The Court held that the Upper Tribunal had erred in refusing to consider submissions regarding Article 8 of the ECHR, when that Tribunal was re-making a decision:-

“[30] ... SIJ Waumsley considered that he *could* not consider article 8 unless IJ Widdup had erred in law in failing to consider it. He therefore put it out of his hands to consider whether he ought to look at the matter in terms of article 8. In my judgment, however, SIJ Waumsley had a *discretion* to consider the article 8 point, even if, as he was entitled to think, the point had not been properly raised in the First-tier Tribunal, nor by any respondent’s notice. It is plain, however, that SIJ Waumsley refused to consider his discretion ...”

...

[33] In these circumstances, I conclude ... that SIJ Waumsley erred in law in rejecting out of hand any possibility of considering the article 8 issue, on the mistaken ground that he could not do so unless he found that IJ Widdup had erred in law in not considering it ...” (Rix LJ; original emphases).

(2) The Pankina issue

33. At the time of the hearing in this appeal and when this determination was being prepared, Pankina remained the leading case on the matter of the proper relationship between, on the one hand, immigration rules made under section 3 of the Immigration Act 1971 and, on the other, guidance and other similar written published materials, not within the ambit of section 3 and which may be amended from time to time by the respondent without the involvement of Parliament. We have already referred at paragraph 9 above to a number of cases in which the Pankina principle has fallen to be applied. It is plain from those cases that somewhat different approaches were taken in attempting to articulate the principle or “test” that might identify matters that require, for their legal efficacy, to be contained in immigration rules. In particular, on several occasions a distinction was drawn between substantive requirements and procedural requirements (or requirements of process) (see eg R (on the application of Ahmed) v SSHD [2011] EWHC 2855 (Admin)).
34. This distinction had nothing to do with whether the provisions of the guidance actually relied on by the respondent in a particular case were or were not in existence at the date when the corresponding immigration rules were laid before Parliament under the 1971 Act. A superficial reading of the case law – particularly R v Secretary of State for Social Services ex p Camden LBC [1987] 1 WLR 819 – might suggest that the immigration rules

could rely upon an outside source, of whatever kind and for any purpose, provided that source is extant and accessible. But the mere fact that the source satisfies those requirements is not, in fact, sufficient. This was explained by Sedley LJ in Pankina: "... the objection is not to rules which rely on outside sources for evidence of compliance. It is to rules which purport to supplement themselves by further rules derived from an extraneous source, whether that source is the rule-maker him-or herself or a third party" [27]. "Albeit the first version of the policy guidance was brought into being within the 40 days allowed by section 3(2) [of the Immigration Act 1971] for the parliamentary procedure, it has been open to change at any time. It is this, rather than the fact that it has in the event been changed, which ... is in my view critical. It means that a discrete element of the rules is placed beyond Parliament's scrutiny and left to the unfettered judgment of the rule-maker" [29].

35. We delayed finalising this determination, in the light of the imminence of the Supreme Court's decision in Alvi. The judgment in that case of has now been given ([2012] UKSC 33). Since the present appellant would succeed, whether one applies Pankina or, as one must now do, Alvi, and given that, as we shall explain, the appellant would in any event be entitled to succeed in her appeal, we did not consider it necessary to invite further submissions from the parties.

36. The Secretary of State's appeal against the judgment of the Court of Appeal in Alvi was dismissed. In doing so, the Supreme Court (per Lord Dyson) chose not to endorse the substantive/procedural test but, instead, adopted the following test:

"[94] ... a rule is any requirement which a migrant must satisfy as a condition of being given leave to enter or leave to remain, as well as any provision "as to the period for which leave is to be given and the conditions to be attached in different circumstances" (there can be no doubt about the latter since it is expressly provided for in section 3(2)) [of the Immigration Act 1971]. I would exclude from the definition any procedural requirements which do not have to be satisfied as a condition of the grant of leave to enter or remain. But it seems to me that any requirement which, if not satisfied by the migrant, will lead to an application for leave to enter or remain being refused is a rule within the meaning of section 3(2).

.....

[96] It seems to me that this approach best reflects what Parliament must be taken to have intended when it enacted section 3(2). There is no evidence that it would be unduly burdensome, let alone administratively unworkable for the Secretary of State. It causes her no administrative difficulty to make the most detailed rules and then lay them before Parliament. I acknowledge the burdens that would be imposed on the Scrutiny Committee to which Lord Hope refers at para 65. It is, however, a striking fact that the immigration rules are already hugely cumbersome. The complexity of the machinery for immigration control has (rightly) been the subject of frequent criticism and in urgent need of attention. But it is not relevant to the present issue.

[97] If the boundary is drawn where I have suggested, that should introduce a degree of certainty which ought to reduce the scope for legal challenges. The key requirement is that the immigration rules should include all those provisions which set out criteria which are or may be determinative of the application for leave to enter or remain."

37. It can immediately be seen that Lord Dyson's test probes deeper than does the substantive/procedural test, since it articulates what makes a particular provision one that has to be included in immigration rules: namely, does it amount to a condition of succeeding under those rules? But even Lord Dyson's test is not a panacea. Although he and Lord Hope were in agreement that (applying Lord Dyson's test) the requirement to achieve an appropriate rate of pay, specified in guidance, was one that had to be in a immigration rule and was therefore legally ineffective (and that this was determinative of Mr Alvi's case), they disagreed as to whether "information as to where to look to assess the state of the resident labour market" was a requirement that had to be in the rules (see [58] to [63] and [103] to [106]). Lord Walker expressed no opinion on this disagreement [109], whilst Lord Clarke [124] and Lord Wilson [129] agreed with Lord Dyson's conclusions.
38. Acknowledging the disagreement, Lord Hope said this:-

"But the fact that Lord Dyson and I differ as to whether changes in the list of newspapers, journals and websites where advertisements may be placed for the purposes of the resident labour market test are changes to the rules may serve as a warning that the wiser course is to assume that everything that is contained in a rule-making document such as that which is before us in this case is caught by the requirement that section 3(2) sets out, and that any changes to any of the material that it contains must be laid before Parliament". [65]
39. The judgments in Alvi are, of course, determinative of what, in this determination, we have still called the Pankina issue. The respondent cannot rely on the required hourly rates contained in the guidance, in order to refuse the appellant's application for leave to remain. This is, on the assumption that, irrespective of the Pankina issue, the guidance had operative effect (as to which, see paragraph 44 below).
40. Before leaving Alvi, in view of what we have said at paragraph 34 above, it is necessary to make clear the following. There is nothing in the judgment of the Supreme Court that suggests its newly identified test turns on whether guidance of the Secretary of State, or other non-rules material that she can subsequently amend, was or was not in existence at the date any associated changes in immigration rules were laid before Parliament pursuant to section 3 of the 1971 Act. If, applying Lord Dyson's test, the pre-existing material amounts in substance to an immigration rule, it is invalid, as not having been through the section 3 process.
41. At [24] Lord Hope noted counsel for Mr Alvi as having:-

“made it clear that it was not his case that no change whatever could be made to details set out in the other document without laying that change before Parliament. It would be open to the Secretary of State to include in the rule a formula or criterion for making changes which could be applied objectively and could not be the subject of controversy, such as for the adjustment of rates of pay according to the Retail Prices Index. Although it he said that he was inclined to say that everything should be laid before Parliament because to do otherwise would enable the Secretary of State to introduce hurdles in the way of applicants which were not subject to Parliamentary scrutiny, it is questionable whether the submission goes too far, given the extent and nature of all the details set out in the Occupation Codes of Practice on UKBA’s website. But it would not be right for us to hold that it goes too far unless we can say where, and how, the line is to be drawn between those changes which it is open to the Secretary of State to make without reference to Parliament and those that must be subjected to Parliamentary scrutiny”.

42. Since, as we have seen, the Supreme Court *did* find itself able to say how the line is to be drawn (albeit that precisely where remains a potentially case-sensitive matter), it would seem that the Court did, in the end, agree with the proposition Mr Alvi’s counsel indicated he was “inclined to say”. There is, however, nothing in the judgment that we consider contradicts the position taken by Mr Drabble QC, regarding the “RPI” example earlier in [24]; although the thrust of the judgment is such that there can only be very limited scope indeed for such instances. To summarise on this issue:

(a) Any provisions in “pre-existing” materials that contain criteria that are or may be determinative of an application are of no legal effect;

(b) That is so, whether or not the materials are capable of being changed; but

(c) There may be scope for an immigration rule to make reference, as a requirement for leave to enter or remain, to a (necessarily pre-existing) formula or criterion that is (i) uncontroversial; and (ii) operates independently of the Secretary of State’s functions under the Immigration Act 1971.

43. Even before the Supreme Court’s judgment in Alvi, it was clear that the application of Pankina did not involve considerations of administrative convenience, contrary to what the First-tier Tribunal judge thought in this case. As we have seen, the judgment specifically considered and rejected the Secretary of State’s submissions that were based on the asserted administrative convenience of including requirements in materials that were not laid before Parliament as immigration rules. The fact that the rates paid for a particular job may need to be frequently altered does not enable the respondent to deal with those substantive requirements – which they plainly are – by means of guidance and the like. They need to be incorporated in immigration rules. The determination of the First-tier judge is, in fact, a good example of the problems that would arise if judicial fact-finders were required to determine the legal efficacy of

materials by reference to considerations of administrative convenience. The judge seems to have taken it upon himself to infer that the requirements of specifying rates of pay would be onerous. But there appears to have been no evidence before him in that regard.

44. In conclusion, we accept Ms Watterson's submission that, in the present case, *if* a requirement existed for the appellant to meet the minimum rate of pay indicated in the code of practice, that requirement was unlawful. We emphasise the word "if" in the preceding sentence. As will be apparent, on the facts of this case, we do not find that the requirement existed.

(3) Legitimate expectation

45. Relying on the judgment of Sir George Newman in HSMP Forum Limited v SSHD [2008] EWHC 664 (Admin), the appellant submits that, on a proper interpretation of the work permit scheme pursuant to which she came to the United Kingdom, she has a legitimate expectation that the respondent would not change the requirements that she had to meet, in order to be accepted for settlement in this country. What emerges from that case, we consider, is that the concept of legitimate expectation is not a separate legal principle but, rather, falls to be regarded as an aspect of the overarching (and developing) public law duty to act fairly. Thus, at [49] Sir George Newman noted the warning of the Court of Appeal in Nadarajah [2005] EWCA Civ 1369, not to construct separate compartments of law where, in truth, a single principle or interlocking principles are in play.
46. At [49] Sir George Newman found that the "conflict to which this case gives rise requires the Court to establish a balance between the importance of preserving the defendant's right to exercise her discretionary powers in the field of immigration control and the desirability of requiring her to adhere to the statements or practice announced in connection with the original HSMP". In order to answer that question, the court was required to apply a "contextual analysis of the purpose in terms of the HSMP up to November 2006" [52].
47. The judgment makes it plain that in finding against the Secretary of State, Sir George Newman regarded it as particularly important that the Secretary of State had publicly stated that the requirements or conditions to be met by an HSMP in order to achieve settlement in the United Kingdom, would not be changed to that person's disadvantage, once he or she had arrived here pursuant to the scheme. Thus, although "it would not have been inconsistent with nor inimical to the scheme for it to be expressly stated that admission to it gave no guarantee that the criteria at the extension stages would not change during the migrant's participation in the scheme", Sir George Newman held that the Secretary of State could not "escape from the consequences of having failed to make that clear".
48. The judge considered the arguments of the Secretary of State, who contended that the public interest in making changes to the HSMP scheme outweighed any unfairness to particular individuals. Sir George Newman

concluded, however, that he did “not regard the issue under consideration as touching important economic interests which are centred upon the policy aim of establishing a more effective scheme for a future applicant” [60]. On the contrary, he was “unable to see a sufficient public interest which outweighs the unfairness, which I am satisfied the changes visit upon those already admitted under the programme. In the circumstances, I am satisfied that the terms of the original scheme should be honoured and there is no good reason why those already on the scheme should not enjoy the benefits of it as originally offered to them. Good administration and straightforward dealing with the public require it”.

49. We agree with Mr Parkinson that there are significant differences between, on the one hand, the HSMP scheme, and the way it was “sold” to certain applicants and, on the other hand, the work permit scheme with which we are concerned. In the case of the latter scheme, there has not been, at any point, a requirement for those embarking on it to make the United Kingdom their principal home, thereby severing or at least reducing ties with their homelands. Furthermore, there have not, so far as we have been made aware, ever been public pronouncements, as there were in respect of the HSMP scheme, to the effect that conditions for eventual settlement in the United Kingdom would remain the same.
50. For these reasons, we conclude that the appellant cannot succeed in challenging the immigration decision in her case, by reference to that part of the public law duty of fairness that falls to be categorised as legitimate expectation.
51. That conclusion is not, however, the end of the matter, so far as fairness is concerned. One must beware drawing a demarcation line, whereby issues of fairness are confined to the realm of legitimate expectation and, if found not to meet the requirements of that test, are then precluded from having any interaction with other forms of legal scrutiny of administrative action.
52. Even if the appellant cannot point to a legitimate expectation that she would be permitted to proceed towards settled status in the United Kingdom, on the same basis that existed when she came here, the position in which she finds herself still raises fairness issues, which require legal scrutiny. As the Tribunal found in Philipson, the appellant:

“was admitted under a work permit valid for five years when at the time of her admission and throughout nearly the entirety of her stay here the Immigration Rules 134 indicated that if she abided by the terms of the work permit and did not act in a manner contrary to public policy she would be entitled to indefinite leave to remain at the end of the five year period. One month before the conclusion of the five year period, the settlement requirements were amended to impose a novel requirement of a wage that met the minimum set out in guidance to Tier 2 sponsors” [16].
53. As the Tribunal held, the “intrinsic lack of justice in this case comes from the attempt at the 59th month of her 60th month stay, to impose wage conditions on her that were irrelevant to the original grant of the work permit. She was unaware of the need to comply with these conditions,

although we recognise that the application form rule 10B does alert the keen reader to a footnote 9 on page 37 from which a reference to the UKBA website and the codes of guidance can be obtained” [17].

54. As with Philipson, the fact that a fair-minded and reasonable reader of the rules, looking at the precise position of this appellant, would regard her as someone who might reasonably be expected to be allowed to continue on her path to settlement, means that the contrary interpretation of the provisions in question, as contended for by the respondent, requires to be closely analysed. That is particularly so of the transitional provisions, to which we shall shortly turn.
55. This is not in any way to suggest that ordinary principles of statutory interpretation are to be displaced. In particular, if, on proper analysis, the respondent’s contention is supported by the plain and ordinary meaning of the rules, then considerations of fairness cannot produce a different interpretative result. However, where the provisions in question are ambiguous or obscure, which is regrettably often the case where the rules comprise or have an interaction with points-based rules, then it is legitimate to interpret the provisions by assuming that Parliament is unlikely to have sanctioned rules which (a) treat a limited class of persons unfairly; and (b) disclose no policy reason for that unfairness.
56. We will revert to that issue in the next section, when we consider the submissions on the question of whether, in fact, the appellant has met the relevant requirements of the immigration rules.
57. A further way in which fairness issues interrelate with other legal principles is in relation to Article 8 ECHR. This interaction is made plain at [19] to [23] of Philipson. In short, issues of fairness can have a material part to play in determining the proportionality of giving effect to an immigration decision, which interferes with a person’s private and/or family life in the United Kingdom.

(4) Does the appellant meet the requirements of the immigration rules?

58. Adopting the approach we have set out above, it is necessary to consider the parties’ submissions on whether the appellant has met the requirements of the immigration rules. Relying on *dicta* in Philipson, Ms Watterson, for the appellant, submitted that she had. At [14] the Tribunal in that case said:-

“14. First, although we will assume for present purposes, without deciding, that there is an appropriate salary rate for the claimant’s job issued under the Tier 2 guidance on 6 April 2011 because transitional arrangement D applies to her, we are far from convinced that this is the case. Transitional arrangement D refers to those who hold a Tier 2 certificate of sponsorship and the certificate of sponsorship confirms that the holder will be working as a senior care assistant (SOC code 6115). 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. 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.”

59. Ms Watterson’s submissions on this issue are clearly set out in her “Further Submissions” document for the hearing on 4 April:-

“14. The importance of this point lies in the fact that the code of practice for job code 6115, that is care assistant and home carers, gives two alternative ‘appropriate salary rates’. The first rate is for ‘New applications under Tier 2’: £7.80 per hour. The second rate is for ‘Applications under the transitional arrangements’ [original emphasis]: £7.02 per hour. Applicants in the Appellant’s position plainly do not fall within the first category of applicants. Unless an application under paragraph 134 is an application “*under the transitional arrangements*” then it cannot properly be held that any ‘appropriate rate’ has been specified in the codes of practice or applies to the Appellant.

15. A copy of transitional arrangement D is appended to this skeleton argument. The UKBA website at the relevant time, made clear that it was only transitional arrangement D which applied to senior care workers. The arrangement contains a concession that those switching from the Work Permit scheme into Tier 2 are not required to score points under a number of the headings usually applicable to Tier 2 migrants. However, these switching applicants are still required to obtain a certificate of sponsorship from a licensed sponsor and it must confirm the appropriate rate of pay under code 6115. Work Permit holders have never been required to obtain a certificate of sponsorship.

16. As regards work permit holders who have been in the UK in a eligible category for 5 years the arrangement simply reads:

‘Where you have currently been in the UK in an eligible category for five years or more and wish to extend your stay, you must apply under the full points-based system criteria. Alternatively, you may apply for settlement.’

17. The website thus makes clear that the concession as to points afforded to those *switching* into Tier 2 does not apply to those who have already accrued the five years necessary to qualify for settlement. Applicants in this position must either apply under the full points-based criteria or apply for settlement.

18. In the premises the Appellant submits that, as aired in **Philipson**, there is no “appropriate rate” of pay applicable to Work Permit holders only 1) a rate for new applicants and 2) a rate for those switching into Tier 2 under transitional arrangement D. As such, it was not lawfully open to the Respondent to refuse the Appellants’ applications on this basis.”

60. It is with no disrespect to Mr Parkinson, who advanced the respondent’s case as ably as could be done, that we conclude Ms Watterson’s submissions are correct and that, even if one assumes (as cannot be the case) that Pankina and (now) Alvi did not disentitle the respondent from specifying an applicable hourly rate by means of guidance, on the facts of the appellant’s case, neither the rules nor that guidance required her to meet any “appropriate rate of pay”. Mr Parkinson submitted that, of the

possible figures, applying the lower rate of £7.02 to the appellant would not result in her suffering a disadvantage. Since this is precisely the basis upon which the appellant's application was refused by the respondent, we cannot accept that submission.

61. As we understood Mr Parkinson, he agreed with Ms Watterson, to the extent that transitional arrangement D did not apply to the appellant. However, Mr Parkinson submitted that the last paragraph of transitional arrangement D applied only to people who were not in a transitional category:-

“Where you have currently been in the UK in an eligible category for five years or more and wish to extend your stay, you must apply under the full points-based system criteria. Alternatively, you may apply for settlement”.

62. Whilst we accept that the consequence of our finding is that a person in the position of the appellant, who had not already been in the UK in an eligible category for five years or more, can apply for settlement, just like a person who had been, the respondent cannot get over the point that the appellant simply does not have a certificate of sponsorship (and could not have been given one). Likewise, that final paragraph of transitional arrangement D cannot, in our view, properly have the effect of requiring the appellant to show that she was paid at £7.02 per hour.
63. In so finding, we have applied the approach to interpretation set out in paragraphs 54 and 55 above. Given that the effect of the respondent's construction of the immigration rules and related published materials would result in a degree of unfairness, the justification for which has not been explained, we consider that it is unlikely Parliament would have permitted the relevant immigration rules to pass the section 3 “scrutiny” process or, indeed, that the respondent herself would have so drawn those rules if, as now contended, they operate so as to deny the appellant the opportunity of making an application for settlement in the United Kingdom.

(5) Article 8

64. At the hearing on 4 April, we set aside the determination of the First-tier Tribunal and indicated that we would re-make the decision in the appeal on all relevant grounds, including (if necessary) Article 8. We heard oral evidence from the appellant, who spoke to her witness statement, in which she explained that she was in a relationship with her partner, Mr Vernon, whom she had met in May 2011. We are satisfied that the appellant and Mr Vernon are cohabiting; although there was a discrepancy in the evidence given by the appellant and by Mr Vernon (from whom we also heard) as to the reason it had taken until only recently for the couple to begin full-time cohabitation. Mr Vernon is a British citizen who works on the “metering side” for Southern Electric. The appellant is currently receiving treatment for breast cancer and Mr Vernon told us that he would be attending her next chemotherapy session, scheduled for 5 April.

65. There is no doubt that the appellant has, during her time the United Kingdom, established a degree of private life, not only by reference to her occupation but also through the friends she has acquired in the process. Additionally, we accept that she has, albeit recently, established a relationship with Mr Vernon. Despite the discrepancy to which we have referred, we do not find that this relationship has been entered into for the purpose of enabling the appellant to remain in the United Kingdom. The parties told us that they had deferred their plans to get married until the appellant's immigration status was resolved. One might regard that as evincing a lack of commitment on either side; but Mr Parkinson did not submit that that was how we should regard it; and we do not in any event do so.
66. We would, therefore, find ourselves having to assess the proportionality of the appellant's removal on her Article 8 private and family life rights. In view of our earlier findings, that the appellant meets the requirements of the immigration rules and that, even if she did not, the immigration decision in her case is not in accordance with the law for Pankina (and, now, Alvi) reasons, there is no question of her being removed from the United Kingdom in consequence of that decision.
67. Were that not to be the case, however, we would conclude that the appellant's removal would constitute a disproportionate interference with her Article 8 rights. In this regard, we should make it plain that we would answer questions 3 and 4 of the five questions in paragraph 17 of Razgar [2004] UKHL 27 in the affirmative. That is because, notwithstanding the "fairness" issues to which we were referred, there is nothing inherently unlawful or undemocratic in the respondent's making of the immigration rules in question. On this scenario, those rules would have been approved by Parliament (albeit negatively) under section 3 of the 1971 Act, notwithstanding the effect that they have on persons in the position of the appellant.
68. However, in assessing the proportionality of consequent removal in pursuance of the immigration decision (question 5), we would have regarded the weight to be given to the respondent's relevant public interest as being reduced to the point where, on the specific facts of this case, the appellant's interests outweighed them. The proportionality of the individual immigration decision appealed has to be determined in the light of the fact that (a) it involves an element of unfairness; (b) it concerns a necessarily limited category of persons; and (c) accordingly, the overturning of that immigration decision is not a matter that can properly be said to undermine or otherwise materially damage public respect for the United Kingdom's system of immigration controls. The strength of the appellant's right to private and family life outweighs the diminished public interest under Article 8(2).

Decision

69. The determination of the First-tier Tribunal is set aside. We re-make the decision by allowing the appellant's appeal under the immigration rules.

Signed
Lane

Upper Tribunal Judge Peter