



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

Tukhas (para 245HD(f): “appropriate salary”) [2016] UKUT 00183 (IAC)

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 22 January 2016**

**Decision & Reasons Promulgated**

**Before**

**MR C M G OCKELTON, VICE PRESIDENT  
UPPER TRIBUNAL JUDGE O’CONNOR**

**Between**

**MARIA TUKHAS**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr E Nicholson, instructed by Migra & Co Solicitors  
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

*The effect of paragraph 14 of Appendix J to the Immigration Rules is that other than where an applicant has contracted weekly hours or is paid an hourly rate, the appropriate salary for the purposes of paragraph 79 of Appendix A is an applicant’s gross annual salary paid by the sponsor employer, subject to the conditions set out in paragraphs 79(i)-(iii) of Appendix A.*

**DECISION AND REASONS**

(Delivered orally on 22 January 2016)

1. The appellant entered the United Kingdom on 28 September 2008 with entry clearance conferring leave as a student until 31 October 2011. Her leave was

subsequently extended, initially as a Tier 1 Post Study Migrant and thereafter as a Tier 4 (General) Student, until 24 February 2015. She made an in time application for a further extension of her leave, on this occasion as a Tier 2 Migrant. This application was refused by the Secretary of State in a decision of 16 March 2015 and on the same date a decision was made to remove the appellant pursuant to s.47 of the Immigration, Asylum and Nationality Act 2006.

2. By paragraph 245HD(f) of the Immigration Rules the appellant was required to obtain 50 points under Appendix A to the Rules. She was, however, awarded only 30 points thereunder by the Secretary of State, having been awarded zero points under the category of “appropriate salary”. The Secretary of State gave the following reasons for so concluding:

“The salary included on your Certificate of Sponsorship is not at or above the appropriate rate for the job, as specified under Appendix A of the Immigration Rules.

In line with Appendix A with reference to Appendix J of the Immigration Rules we have therefore been unable to award points for appropriate salary. The reasons for this decision are detailed below. Your Certificate of Sponsorship states that your prospective employment most closely corresponds to occupation code 2126 of the Codes of Practice (which are also specified under Appendix J...)

From 6 April 2013 a new policy on rates of pay for new entrants and experienced workers within the Codes of Practice was introduced. The minimum acceptable rate of pay for a 39 hour working week for your prospective employment is £22,600 per annum as stated on occupation code 2126 under the new entrant appropriate salary rate.

Your Certificate of Sponsorship states that your salary would be £22,600 per annum for a 40 hour week which equates to £22,035 per annum for a 39 hour week.

As your prospective salary is not at or above the minimum rate as specified in the Codes of Practice... under the new entrant level and you do not meet any exemptions as specified in Appendix A of the Rules, we do not consider it to be at the appropriate rate for the job.”

It is the lawfulness of this conclusion that formed the only issue before the First-tier Tribunal.

3. The appeal before the First-tier Tribunal was heard by First-tier Tribunal Judge Fowell and dismissed in a decision of 10 June 2015, the material paragraphs of which read:

“5. In support of her appeal Ms Tukhas has obtained from her employer a new contract of employment dated 24 February 2015, providing for the same salary but specifying that she worked 39 hours per week (although the hours to be worked are not specified). The sponsorship licence was amended accordingly.

6. Although not expressly stated therefore, the only ground of appeal is that the decision was not in accordance with the immigration rules.

7. It is not sufficient however to satisfy the rules at the date of the appeal. The appellant needs to satisfy the Tribunal on the balance of probabilities that she did so at the time she made the application. It is clear from her new evidence that she did not.”
4. In her appeal to the Upper Tribunal the appellant asserts that, contrary to the decision of the First-tier Tribunal, she did meet the requirements of the Immigration Rules as of the date of her application; it being submitted that the Secretary of State took an unlawful approach to the issue of ‘appropriate salary’ in her decision letter.
5. Before the Upper Tribunal Mr Walker accepted this to be so and further accepted that the appellant met the requirements of the Immigration Rules at the relevant date. We consider this to be a proper and accurate concession for the following reasons.
6. In our view the interpretation to be given to the Rules is clear.
7. By Paragraph 79 to Appendix A: *“The points to be awarded for appropriate salary will be based on the applicant’s gross annual salary to be paid by the sponsor”*, subject to specified conditions such as the non-inclusion of monies paid as travel and subsistence, which are not relevant to the instant case. An applicant who has an ‘appropriate salary’ will be awarded 20 points under Appendix A (Paragraph 76A and Table 11A of Appendix A). No points are to be awarded for ‘appropriate salary’ if the salary referred to in paragraph 79 of Appendix A is less than the ‘appropriate rate for the job’ as stated in the Codes of Practice in Appendix J (see Paragraph 79B of Appendix A).
8. Paragraph 14 of Appendix J reads:

“Appropriate Salary Rate:

Where these Rules state that an applicant must be paid the appropriate rate for a job as set out in this Appendix the rate will be determined as follows:

  - (a) Where the most appropriate match for the job in question appears in Tables 1 to 5 or Table 9, the appropriate rate is as stated in the relevant Table (in this case the appropriate rate is set out in Table 2 and is £22,600 per annum for the relevant employment)...
  - (e) The rates stated are per year and are based on the following weekly hours:
    - (i) Where the source is the Annual Survey of Hours and Earnings, a 39-hour week; ...

Where the applicant has contracted weekly hours or is paid an hourly rate, the rates must be pro-rated accordingly...”
9. It is plain that the effect of paragraph 14 of Appendix J is that other than where an applicant has contracted weekly hours or is paid an hourly rate, the appropriate salary for the purposes of paragraph 79 of Appendix A is an applicant’s gross annual salary to be paid by the sponsor employer, subject to the conditions set out in

paragraphs 79(i)-(iii), which do not bear on the instant case. This salary will be recorded on the Certificate of Sponsorship.

10. The fact that an applicant works in excess of 39 hours per week is only relevant if that applicant also has contracted weekly hours or is paid an hourly rate. In these, and only these, circumstances an applicant's gross annual salary is pro-rated for the purposes of paragraph 79 of Appendix A.
11. In the instant appeal the appellant's Certificate of Sponsorship identifies that she will be paid a gross annual salary of £22,600. There is no admissible evidence before us which supports a contention that this applicant was contracted to work weekly hours or paid an hourly rate. Consequently the applicant's appropriate salary for the purposes of consideration under paragraph 79 of Appendix A is to be taken as being £22,600 per annum. The "appropriate rate for the job" (paragraph 79B to Appendix A) is that set out in Table 2 of the Codes of Practice in Appendix J to the Rules (code 2126). In the instant case that is also £22,600.
12. The appellant is therefore entitled to an award of 20 points under the 'appropriate salary' head of Appendix A and accordingly is entitled to 50 points under Appendix A - the Secretary of State having already accepted the appellant's entitlement to 30 points under the Certificate of Sponsorship head. Consequently, contrary to both the decision of the Secretary of State and the conclusion of the First-tier Tribunal, the appellant meets the requirements of paragraph 245HD of the Rules.
13. The decision of the First-tier Tribunal to the contrary is set aside. We re-make the decision allowing the appeal on the basis that the appellant meets the requirements of the Immigration Rules.

### **Notice of Decision**

The decision of the First-tier Tribunal contains an error on a point of law capable of affecting the outcome of the appeal and is set aside.

We re-make the decision allowing the appellant's appeal on the ground that the Secretary of State's decision was not in accordance with the Immigration Rules.

Signed:



Upper Tribunal Judge O'Connor