



Upper Tribunal
(Immigration and Asylum Chamber)

Chau Le (Immigration Rules - de minimis principle) [2016] UKUT 00186 (IAC)

THE IMMIGRATION ACTS

Heard at Field House, London
On 23 February 2016

Decision promulgated on

Before

The Hon. Mr Justice McCloskey, President
Deputy Upper Tribunal Judge Mandalia

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NGOC BAO CHAU LE

Respondent

Representation:

Appellant: Mr D Clarke, Senior Home Office Presenting Officer

Respondent: Mr R Claire, of counsel, by direct access

The de minimis principle is not engaged in the construction or application of the Immigration Rules. Properly analysed, it is a mere surrogate for the discredited “near miss” or “sliding scale” principle.

DECISION

Introduction

1. The origins of this appeal can be traced to a decision made on behalf of the Secretary of State for the Home Department (the “Secretary of State”), dated 09 November 2014,

whereby the application of the Appellant, a national of Vietnam aged 22 years, for further leave to remain in the United Kingdom as a Tier 4 (General) Student was refused. The application failed on the basis of non-compliance with the “maintenance” requirements of the Immigration Rules. In accordance with these requirements, it was incumbent on the Appellant to demonstrate that her bank account had a minimum credit balance of £2,040 during the relevant period of 28 consecutive days. Accompanying her application were bank statements demonstrating a balance of £2,028.32 only. The application was refused accordingly.

2. The Appellant’s ensuing appeal to the First-tier Tribunal (the “FtT”) succeeded. It was allowed by the application of the principle of *de minimis non curat lex* (the “de minimis principle”). The Judge analysed the evidence in the following way:
 - (a) During the first 20 days of the 28 day period the shortfall in the Appellant’s bank account was £11.68.
 - (b) On the 21st day this reduced to £1.69.
 - (c) From the 22nd to 28th days inclusive the balance was £3.31 above the minimum required.

The Judge reasoned that the non-compliance was so minimal that the Rules should have been “*considered to have been complied with*”.

3. The Secretary of State has been granted permission to appeal to this Tribunal on the ground that in thus reasoning and concluding the FtT arguably erred in law.

The De Minimis Principle

4. It is necessary to study the route by which the FtT made its decision. First, he referred to R (Behary) v Secretary of State for the Home Department [2013] EWHC 3575 (Admin). This is an admirably constructed and reasoned first instance decision, of the Administrative Court, in which the claimant challenged the Secretary of State’s decision to refuse her application for further leave to remain as a Tier 4 (General) Student on the ground that it was out of time, having been received two days after the expiry of her extant leave. Deputy Judge Grubb accepted that, in principle, the *de minimis principle* “.... can be applied in the application of both statutory provisions and the *Immigration Rules*”: see [94]. However, the Judge rejected the argument that it was of application in the particular context, on two grounds. First, the non-compliance with the rule in question could not be classified trivial: see [97]. Second, the context within which the non-compliance occurred was one crying out for a “bright line” rule in accordance with the principle of legal certainty: see [98] – [104].
5. The argument advanced in Behary drew on two sources, each a decision of the Court of Appeal. The first is MD (Jamaica) and GE (Jamaica) v SSHD [2010] EWCA Civ 213, where the question was whether the requirement in the Rules of ten years

continuous residence, for the purpose of securing indefinite leave to remain, was satisfied in circumstances where the first appellant had resided in the United Kingdom for a period of some 12 years but, in the course thereof, had acquired the status of over stayer for two periods, of some three weeks and four months duration respectively. In the case of the second appellant, the residence period exceeded ten years but was punctuated by a phase of some ten weeks duration when he had the status of over stayer on account of having made a late application, which ultimately succeeded. Dyson LJ, delivering the judgment of the Court, having rejected a series of arguments advanced on behalf of the appellants, stated in [27]:

*“Finally, I see nothing absurd in giving the rule its plain and ordinary meaning. The case of the applicant who submits his application one day late is catered for by an application of the principle *de minimis non curat lex* (the law is not concerned with very small things).”*

The appeals were dismissed.

6. The final landmark in the journey of the FtT was a further Court of Appeal decision is Miah and Others v SSHD [2012] EWCA Civ 261, where a similar question fell to be determined. The issue was whether the appellant qualified for indefinite leave to remain as a work permit holder notwithstanding that during part of the qualifying period stipulated by the Rules, five years, he had no extant work permit. When he made his application to the Secretary of State he was able to demonstrate continuous residence of four years and ten months. A perusal of the judgment confirms that the argument formulated on his behalf was that this “near miss” should be forgiven. It was recorded in this way, at [10]:

“.... In oral argument the submission was that the weight to be given to non-compliance with the Rules diminishes where the applicant is ‘nearly’ or ‘almost’ compliant.”

Under the rubric “Discussion”, Stanley Burnton LJ stated, at [12]:

*“I first of all point out that the ‘Near-Miss’ principle contended for is not the same as the *de minimis* principle. If a departure from a rule is truly *de minimis*, the rule is considered to have been complied with. The starting point for the Near-Miss argument is that the rule has not been complied with. In the present case, the failure to satisfy the requirement of five years lawful residence as a work permit holder, by a period of some two months, was not *de minimis*.”*

The reasoning underpinning this conclusion is set forth in [13] – [26] of the judgment. The Court held that bright line rules are necessary in the interests of certainty, predictability, efficacy and utility. Disagreeing with the decision of a different constitution of the court in Pankina and Others v Secretary of State for the Home Department [2010] EWCA Civ 719, the court in Miah decided unambiguously, per Stanley Burnton LJ, at [26]:

“... I would dismiss the appeal in relation to the Near-Miss argument. In my judgment, there is no Near-Miss principle applicable to the Immigration Rules.”

7. The operation of the *de minimis* principle in certain fields is well established. For example, it is sometimes invoked (correctly or otherwise) in the field of tort in support of the proposition that trivial physical contact giving rise to no recognisable injury does not attract a right to compensatory damages. In the altogether different field of copyright, infringement claims have been dismissed on the ground that the alleged infringer's user of the protected work was so insignificant as to be *de minimis*.
8. The *de minimis* principle can also denote a minimum quantity threshold, for example in the context of state aid: see Commission Regulation (EC) Number 1998/2006, which prescribes a threshold of €200,000. Equally, in the sphere of competition law, certain agreements in contravention of Article 101(1) of the Treaty on the functioning of the European Union are considered to be *de minimis* and, therefore, valid. Thus so-called “horizontal” agreements, viz contracts made between competitors, are normally classified *de minimis* where the party's market share is 10% or less. The principle also features in the law of criminal causation, for example in the case of second degree murder: see the well known Canadian decision in R v JSR (A Young Person) 2008 ONCA 544.
9. The *de minimis* aphorism is nothing if not versatile and resourceful. According to Blackstone's Commentaries, the doctrine of the right of riparian proprietors to alluvion gained by subtle degrees originates in this principle. Its influence is also discernible in the doctrine of riparian accretions and the rule that the law does not consider fractions of a day. It also exercises influence in the law of defamation, where certain imputations against a person's character or reputation have been held too trivial to be actionable.
10. The *de minimis* principle may also exercise some influence, perhaps imperceptible on occasions, in the construction of legislation. Thus, for example, it may contribute to the resolution of the familiar question of whether a statutory provision, typically framed in the terms of a requirement, is mandatory or merely directory. The court will consider, fundamentally, the importance of the matter in the light of the subject matter and general purpose of the statute and, as part of this exercise, the question of whether full and literal compliance with the provision is essential to implementing the legislative intention. One of the leading authorities on this topic is R v Immigration Appeal Tribunal, ex parte Jeyanthan [2000] 1 WLR 354.
11. Pausing at this juncture, it is not easy to comprehend how the *de minimis* principle can have any application in the context of construing and applying bright line rules in the field of immigration, whether enshrined in primary legislation or subordinate legislation or the Immigration Rules themselves. Whither the values of predictability, certainty and finality if this adage, or principle, is permitted to intrude and influence?

12. The so-called “near miss” or “sliding scale” principle invites further consideration. It gained some currency during a finite period mainly as a result of the decision of the Court of Appeal in Pankina, at [45]-[46]. The principle had a relatively short lived lifespan. Ultimately it received its *quietus* in Patel v Secretary of State for the Home Department [2013] UKSC 72, wherein Lord Carnwath JSC delivered an opinion with which the other members of the Supreme Court agreed. This decision entailed an unequivocal rejection of Pankina. See [56]:

“Although the context of the rules may be relevant to the consideration of proportionality, I agree with Burnton LJ that this cannot be equated with a formalised “near-miss” or “sliding scale” principle, as argued for by Mr Malik. That approach is unsupported by Strasbourg authority, or by a proper reading of Lord Bingham’s words. Mrs Huang’s case for favourable treatment outside the Rules did not turn on how close she had come to compliance with Rule 317, but on the application of the family values which underlie that Rule and are at the heart also of Article 8. Conversely, a near-miss under the Rules cannot provide substance to a human rights case which is otherwise lacking in merit”.

The retreat from Pankina was thereby completed.

13. Lord Carnwath’s consideration of this discrete question of law is extensive, beginning at [45] and ending at [57]. He makes a clear distinction, in the context which we have just outlined, between a case which fails to satisfy a requirement, or requirements, of the Rules by a narrow margin and a case made under Article 8 ECHR in which a marginal failure of this nature is invoked by the claimant. In the first of these contexts, the marginal failure is irrelevant. In contrast, in the second context it may be a relevant consideration. This seems quite unexceptionable. The Article 8 claimant whose case turns on proportionality and who has a poor immigration history and a case which is decisively non-compliant with the Rules will almost invariably fare worse than the claimant whose history is one of general compliance and/or marginal non-qualification and non-compliance as regards the Rules. A proper appreciation of the doctrinal basis upon which this distinction rests is essential. It has nothing to do with the now discredited “near miss” doctrine.
14. For our part we would not be prepared to hold that the *de minimis* principle has any application in a context where the question is whether a requirement of the Immigration Rules has been observed. The Immigration Rules and the Points Based System in particular, set out clearly, the criteria to be met or the requirement to acquire a certain number of points.
15. We consider that in every such case the first task to be performed is to construe the rule in question. This exercise is performed by applying the principles in Mahad v Entry Clearance Officer [2009] UKSC 16, at [10] especially (per Lord Brown). Having construed the rule, the next question is whether, on the facts found and/or admitted, the applicant’s case complies with the relevant rule. In our judgment this is a black and white question. Either the applicant satisfies the Rules or he does not. No intermediate, or third, possibility exists. The prevalence of “bright line” provisions in

the Immigration Rules has been repeatedly considered lawful as they promote consistency, certainty and equality of treatment among immigrants.

16. Furthermore, we have difficulty in distinguishing both conceptually and logically between a minor, or minimal, failure to satisfy a rule (the discredited “near miss” principle) and the operation of the *de minimis* principle. It seems to us that, in substance and reality, the effect of invoking the *de minimis* argument in Behary and the present case is simply to espouse the discredited “near miss” principle in a different guise. No principled distinction between the two is to be found in MD, Miah or Behary and none was identified in the arguments advanced on behalf of the Appellant.
17. Our final reservation about the application of the *de minimis* principle to questions of compliance with the Immigration Rules is based in the decisions in MD and Miah. The passages in these decisions upon which the spotlight falls invite two observations. The first is that their treatment of the *de minimis* principle is fleeting at best. The second is that they are *obiter*. In this respect, we wholeheartedly reject the argument to the contrary noted in Behary at [103]. In short, if a rule in the field of immigration cannot be legitimately construed as giving rise to some flexibility or discretion or the possibility of exceptions, it will normally attract the familiar appellation of “bright line” and must, therefore, be given full and literal effect. In cases where this generates harsh or austere outcomes, mitigation and relief are to be found by recourse to the Secretary of State’s residual discretion to waive or modify a given requirement of the Rules (noted recently in Secretary of State for the Home Department v Khan [2016] EWCA Civ 137, at [19]) or the possibility of making a fresh application for the benefit or status sought or in asserting disproportionality, where a qualified human right is in play.
18. Given the uncompromising terms in which the “near miss” or “sliding scale” principle has been rejected at the highest judicial level, we are of the opinion that in decision making contexts involving the determination of whether compliance with the Immigration Rules is demonstrated in any given case, the *de minimis* principle has no purchase. Properly analysed, it is a surrogate for its discredited cousin, a mere trespasser straying from its legitimate sphere of operation.

Decision

19. We are of the opinion that the rule in play in these proceedings is of the bright line variety. Furthermore, as our analysis above shows, we disagree with the suggestion that there is binding Court of Appeal authority to the contrary. Accordingly, we conclude that the FtT erred in law. The materiality of its error being beyond plausible dispute, its decision must be set aside in consequence.

The Decision Re-made

20. Given the approach that is mapped above, there can only be one decision. The Appellant's application was non-compliant with one of the mandatory, inflexible, unforgiving requirement of the Rules. It follows that the Secretary of State's decision is unassailable. The decision is therefore re-made by dismissing the Appellant's appeal, subject to any representations in writing within 21 days of the date of promulgation hereof.
21. We would add that comprehensive treatment of this subject by the Court of Appeal would be welcome in an appropriate case.

Bernard McCloskey

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 15 March 2016