Upper Tribunal
(Immigration and Asylum Chamber)

OK (paragraph 245Z(e) – transitional provisions – Maintenance (Funds)) Ukraine [2010] UKUT 166 (IAC)

THE IMMIGRATION ACTS

Heard at Field House

On 5 January 2010

Before

SENIOR IMMIGRATION JUDGE ESHUN

SENIOR IMMIGRATION JUDGE GLEESON

Between

OK

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr E Wilford, Counsel instructed by Advisa Solicitors

For the Respondent: Ms Z Kiss, Home Office Presenting Officer

1. The Respondent's transitional provisions in relation to Maintenance (Funds) requirements, ending on 31 October 2008, are not to be confused or conflated with the transitional provisions for Attributes and English Language for those remaining on the IGS/SEGS/FT:WISS schemes after 30 June 2008.

2. While an applicant may be entitled to the benefit of both transitional provisions where an application for Tier 1 (Post-Study Work) was made before 31 October 2008, applicants wishing to transfer from IGS/SEGS/FT:WISS to Tier 1 (Post-Study Work) whose applications were made after that date will need to meet the Maintenance (Funds) requirement in the normal way.

DETERMINATION AND REASONS

1.
The appellant, a Ukrainian citizen, appeals against the determination of Immigration Judge Abebrese dismissing her appeal against the decision of the Respondent to refuse to vary her leave to remain in

the United Kingdom to change her status from the International Graduates Scheme (IGS) to be a Tier 1 (Post-Study Work) Migrant pursuant to paragraph 245Z (e) of the Immigration Rules HC 395 (as amended).

2.
The issue before the AIT was whether that decision was consistent with the transitional arrangements which the Respondent put in place with the introduction of the Points-Based System. The only point at issue was whether the appellant could meet the Maintenance (Funds) requirement as it appeared that she had not had personal savings at the level of £800 for the three month period preceding her application, in this case, between 12 November 2008 and 11 February 2009 (the funding period). The United Kingdom bank account showed that the appellant's account fell consistently below that minimum. A letter from her bankers in the Ukraine, Ykpcousahk Bank, was not supported by a letter from the financial institution governing the banks of Ukraine, and gave only the balance in her account on one date. It was not evidence that any particular level of funds was available throughout the three month period specified above.

3.
The appellant also made a human rights claim. She had been in the United Kingdom for seven years, was in a serious relationship and lived with her boyfriend. She had 'baptised a boy who is five years old' but it was unclear whether this was her child. She was working, and was valued in the school where she taught. She considered that it would be difficult for her to adapt to life in the Ukraine on her return. The majority of her family members were still in the Ukraine. The Immigration Judge dismissed the appeal on immigration and human rights grounds.

4.
The appellant challenged the Article 8 element of the determination as disproportionate, arguing that the Tribunal had failed properly to apply the judgment of the House of Lords in Huang [2007] UKHL 11 at paragraph 19.

5.
She mounted a vigorous challenge to paragraph 245Z(e), complaining that no decision had been made on her request to cite a number of unreported determinations, and that it was an error of law for the Immigration Judge to consider that the post-study work transitional provisions were clear and unambiguous.

6.
On 28 July 2009, SIJ Chalkley ordered reconsideration. He refused leave on Article 8 and on the unreported determinations questions but considered that 'the judge may have materially erred in law by failing to consider and apply the applicable Transitional Arrangements'. The appeal came before a panel of two SIJs for full reconsideration on 5 January 2010, but although the panel agreed on its decision shortly after that, it was not possible to finalise the determination before the AIT ceased to exist on 15 February 2010. The appellant did not appear to give evidence and it was clear from difficulties during the hearing that her representatives did not have up-to-date instructions from her.

7.
Pursuant to Schedule 4 to the Transfer of Functions of the Asylum and Immigration Tribunal Order 2010 (SI 2010/21):

"4. Where the reconsideration of an appeal by the Asylum and Immigration Tribunal under section 103A of the 2002 Act has commenced before 15 February 2010 but has not been determined, the

reconsideration shall continue as an appeal to the Upper Tribunal under section 12 of the 2007 Act and section 13 of the 2007 Act shall apply."

8.
This appeal accordingly falls to be determined as an appeal before the Upper Tribunal. We have reminded ourselves that the standard of proof in immigration appeals is the ordinary civil standard of balance of probabilities.

Evidence before the original Tribunal: Appellant's bundle

9.
The Tribunal has the benefit of the appellant's bundle of evidence which was before the original Immigration Judge. In a statement signed on 23 May 2009, the appellant stated that:

"8. I was quite upset to find out that my Tier 1 (Post-Study Work) application was refused. I have always followed all the requirements of the Home Office and because I was a participant of the International Guidance Scheme (IGS) I thought that the Transitional Arrangements would be applied and that I did not need to meet any points requirements or that I only had to demonstrate £800 in my account at the end of each month or on the date of my application. Besides my initial solicitor who assisted me with my application confirmed that my net income of £880 per month would be enough to qualify for the programme. Unfortunately that solicitor provided me with wrong advice and because I relied on that advice, my application was rejected."

10.
She goes on to refer to having lived in the United Kingdom for seven years and having 'baptised a boy' who was more than five and a half years old. If that is her own son, then the Maintenance (Funds) requirements should be higher by £533.

11.
The appellant produced a copy of the Immigration Rules which at paragraph 245Z (e) state that the applicant must have a minimum of 10 points under paragraphs 1-2 of Appendix C. The appellant also produced Appendix C which stated that:

"Tier 1 Migrants

1.
An applicant applying for entry clearance or leave to remain as a Tier 1 Migrant (other than as a Tier 1 (Investor) Migrant) must score 10 points for funds.

2.
10 points will only be awarded if an applicant …

(b)
Applying for leave to remain, has the level of funds shown in the table below and provides the specified documents.

Level of funds Points

£800 10 "

12.
That is absolutely clear. However, the Respondent's website commentary was in the following terms:

“Tier 1 (Post-Study Work) – IGS – transitional arrangement

If your leave to remain on the basis of IGS or SEGS expired before 30 th June 2008, you will not be eligible to apply for an extension under Points-Based System Tier 1 (Post-Study Work).

If you have valid leave to remain under IGS or SEGS on or after 30 th June 2008, you will be able to apply to extend your permission to stay in your existing category. You will not be required to meet the points requirement if you are applying under this transitional arrangement. You can apply under these Transitional Arrangements at any time from 30 th June 2008. If your application is successful you will receive an extra year from the date your visa is due to expire. You will need to use application form Tier 1 (Post-Study Work), which is available on the UK Border Agency website at:

http://www.ukba.homeoffice.gov.uk/workingintheuk/tier1/poststudy/

If your application is successful you will be granted further leave to remain, up to a combined total of two years in your existing category and the Post Study Work category, during which time you will be free to seek employment without having a sponsor.

Please note, you cannot make an application under these Transitional Arrangements if you are not in the United Kingdom.

You will be able to apply to switch in the United Kingdom from Tier 1 (Post-Study Work) to Tier 1 (General, Investor or Entrepreneur) or Work Permit employment (Tier 2 when implemented), or Student (Tier 4 when implemented) or Student (Tier 4 when implemented). However, please note, time spent in the United Kingdom in the Tier 1 (Post-Study Work) category does not count towards the qualifying period for Indefinite Leave to Remain.”

Tier 4 was implemented on 31 March 2009.

13.
The appellant also relies on a chain of emails sent to and from Lisa Amin and the UKBA in relation to a different appellant, which (in date order, and so far as relevant) was as follows:

14 November 2008:	Student asks for guidance to application for Tier 1 (Post-Study Work) as replacement for remaining year of IGS. The student explains that most of his money has been sent home and so he cannot show £800 in the United Kingdom for the entire three months before the application. The student asks whether it is necessary to do so.
1 December 2008	Urgent reminder as no response received
3 December 2008	UKBA responded: “Dear Sir/Madam Thank you for your enquiry. When applying for Tier 1 (Post-Study Work) or Tier 1 (Entrepreneur) from within the United Kingdom, applicants are required to submit documents showing they have had savings of at least £800 for at least three months before applying. If the balance has dipped below £800 during the three month period, the requirement will not be met.

	If they are including dependants in their application or applying separately for dependants, they will need to show additional savings of £533 for each dependant. … The types of documents you need to send to support your application are described on the UK Border Agency website at: http://www.ukba.homeoffice.gov.uk/workingintheuk/tier_1/poststudy/supportingevidence/main Yours faithfully Elizabeth Bennett Immigration Group UK Border Agency" `

15.
Thus far, the correspondence supports the Respondent's declared position. The applicant in the email chain then challenged the response, quoting from the Transitional Arrangements automated email response:

4 December 2008	"Thanks a lot for your response. My case falls in below category "Tier 1 (Post-Study Work) – IGS – transitional arrangement" and as per automated response, there are no points requirements to be meet, which means not even for maintenance requirement, am I correct in understanding this? If your leave to remain on the basis of IGS or SEGS expired before 30 th June 2008, you will not be eligible to apply for an extension under Points-Based System Tier 1 (Post-Study Work). If you have valid leave to remain under IGS or SEGS on or after 30 th June 2008, you will be able to apply to extend your permission to stay in your existing category. You will not be required to meet the points requirement if you are applying under this transitional arrangement. You can apply under these Transitional Arrangements at any time from 30 th June 2008. If your application is successful you will receive an extra year from the date your visa is due to expire. You will need to use application form Tier 1 (Post-Study Work), which is available on the UK Border Agency website at: http://www.ukba.homeoffice.gov.uk/workingintheuk/tier1/poststudy/ "
8 December 2008	The UKBA auto response replied with the same response as the appellant had quoted, signed 'Wayne Fairweather, Immigration Group, UK Border Agency'
9 December 2008	The applicant asked what she was supposed to do with the form: "When I am filling up forms, it requires me to fill section for Maintenance (Funds) Requirement. What am I suppose to do with this section, as you have mentioned no

	points requirements for Tier 1 (Post-Study Work) – IGS – transitional arrangement. Please can you guide me what shall I fill in for above section
4 February 2009	The UKBA replied as follows: “Dear Sir Thank you for your enquiry. Please be advised provided you have filled out section 3b You will not be required to meet the points requirement if you are applying under this transitional arrangement. Please send as much documentary evidence to support your application. Yours faithfully Maureen Davenport Immigration Group UK Border Agency”

16.
That response, which appears to be a modified auto response, suggests that the Transitional Arrangements did not end on 31 October 2008 but were still in force on 4 February 2010. However, the appellant was not personally misled by it and never relied upon it; the correspondence was not with her or her representatives, and Lisa Amin (one hopes with authority) later made it available to the appellant’s representatives for use in these proceedings.

Additional evidence for reconsideration hearing: Respondent’s Supplementary Bundle

17.
Ms Kiss acknowledged that there were some infelicities in the email chain and the auto response which was unhelpful. She had endeavoured to resolve the matter by extracting as many timed versions of the policy guidance from the Respondent’s website as she could. The first document is the eligibility guidance to be found on the link: http://www.ukba.homeoffice.gov.uk/workingintheuk/tier1/poststudy/eligibility from 11 November 2008 which stated that different points requirements existed for those on the IGS and that an applicant ‘should read all the information in this section before you apply’. An undated document about the transitional arrangement stated that IGS holders must have no recourse to public funds ‘which means you will not be able to claim most benefits paid by the state’. No other financial requirement was there specified.

18.
The next document is the auto response text for 2 January 2009 which, after setting out the £800 requirement for Tier 1 (Post-Study Work) then sets out the Tier 1 (Post-Study Work) – IGS – Transitional Arrangements with no mention of maintenance as long as the IGS leave was still in force on 30 June 2008. It is common ground that the appellant never received that auto response, because she never emailed UKBA about the point.

19.
On 16 January 2009, the policy guidance changed again but the IGS transitional provisions remained the same. On 2 March 2009, there was a further revision, but the text for IGS transitional provisions was unchanged.

20.
On 19 May 2009, there was a further modification, and the transitional provisions now included the following sentence for the first time: “However, please note that you will need to meet the points requirement for maintenance” before directing the applicant to the form, as did all the previous versions.

21.
Three copies of the Tier 1 (Post-Study Work) Migrant application form appear in the bundle. The first, at Tab E, seems to be the relevant version for this appeal since it relates to applications made on or after 27 November 2008. It states that applicants need to read the separate policy guidance notes for the form. At the beginning of Section 3B, Transitional Arrangements, the appellant is referred again to the policy guidance notes.

22.
Section 3B requires 75 points for Attributes under the Transitional Arrangements, but says that leave under any of three categories (IGS, SEGS or FT:WISS) equates to 75 points. The applicant is then directed to section 4M (English language), which indicates that where the applicant has 75 points under Attributes (as IGS scheme members will have), 10 points for English language will be awarded. The applicant is next directed to section N, Maintenance (Funds), which contains no similar exception, and then on, through the rest of the form.

23.
The second, at tab G, is for applications made on or after 31 March 2009 and the final version of the form (Tab F) is for applications made on or after 1 October 2009. They are all in the same terms. It seems clear that the policy guidance is expressly incorporated into the completion of the form, but the application forms themselves do not appear to us to be determinative of the question whether the Maintenance (Funds) requirement must be met by those on Transitional Arrangements for IGS, SEGS or FT:WISS.

24.
Four versions of the policy guidance are produced. The first in time went live on 9 August 2008: at paragraph 86 thereof, it states that under the Transitional Arrangements of Tier 1 (Post-Study Work) applicants must score (inter alia) 10 points for Maintenance (Funds) and paragraph 87 states that such applicants must have ‘£800 of available funds’. Under Maintenance (Funds), the next heading is “Maintenance requirement – all applications” and states that ‘Applicants in the United Kingdom seeking further leave to remain must have at least £800 of personal savings which must have been held for at least three months prior to the date of application”. The next version of the policy guidance went live on the UKBA website in January 2009. It is the same. The other two versions are later than the appellant’s application and do not assist us.

The hearing

25.
The Tribunal had the benefit of a supplementary skeleton argument by Mr Ellis Wilford, Counsel for the appellant. He noted that the facts in this appeal were ’extremely similar’ to those in SK (Tier 1 – transitional provision – maintenance) Republic of Korea [2009] UKAIT 00032, in which the AIT had held that the Transitional Arrangements applied only to applications made on or before 31 October 2008, but that the Tribunal in that determination misunderstood the email chain as being disjunctive rather than a coherent account of an attempt by an unnamed appellant to obtain more information

about a conflict between the Tier 1 (Post-Study Work) application form and the supporting guidance, including guidance given by the auto response emails.

26.
The appellant accepted that during the funding period, her bank account fell below £800. She argued that the Respondent's policy guidance as to the required level of funds was ultra vires and the Tribunal had a discretion as to the level of funds required. The appellant contended that the email chain, should be regarded as being in the public domain and creating, for this appellant, a legitimate expectation that her application also would be subject to transitional provisions which did not require her to demonstrate savings amounting to £800 for every day of the funding period.

27.
The UKBA guidance is referred to in appendix C of the Immigration Rules which sets out the Maintenance (Funds) qualifications. The appellant submitted that the email chain indicated that those who enquired of the UKBA whether or not they had to satisfy the Maintenance (Funds) requirements were informed that they need not do so if their previous leave had been granted under the IGS scheme. The specific IGS guidance did, therefore, give rise to a legitimate expectation not limited to the Points-Based System criteria of Attributes and command of English and SK (paragraphs 33-35) was wrong. The email chain was 'fresh evidence'.

28.
In submissions, Ms Kiss said that those emails were sent from a UKBA public mail box and accepted that there was an element of misdirection in the standard paragraphs used. She accepted that some people might have received such an email but not the present appellant, and the application form clearly directed all applicants to the Respondent's policy guidance. The email chain was not 'new evidence' in the Ladd v Marshall sense, as summarised in E v Secretary of State for Home Department [2004] EWCA Civ 49 (usually known as E and R)

" 23. ii) New evidence will normally be admitted only in accordance with " Ladd v Marshall principles" (see Ladd v Marshall [1954] 1 WLR 1489), applied with some additional flexibility under the CPR (see Hertfordshire Investments Ltd v Bubb [2000] 1 WLR 2318 , 2325; White Book para 52.11.2). The Ladd v Marshall principles are, in summary: first, that the fresh evidence could not have been obtained with reasonable diligence for use at the trial; secondly, that if given, it probably would have had an important influence on the result; and, thirdly, that it is apparently credible although not necessarily incontrovertible. As a general rule, the fact that the failure to adduce the evidence was that of the party's legal advisers provides no excuse: see Al-Mehdawi v Home Secretary [1990] 1AC 876. "

The Tribunal should uphold the reasoning of SIJ Batiste in SK .

29.
Mr Wilford then applied for an adjournment to take full instructions from the appellant and to await the outcome of a case pending before the Court of Appeal called Marinkovic which might be determinative of the point. The Administrative Court had stayed an appeal pending the outcome of Marinkovic . He was unable to identify that case, as it had been anonymised. There would be no prejudice to the Respondent in an adjournment since the appellant would continue to have leave under s.3(c) of the Immigration Act 1971 until the appeal was determined. The Tribunal notes that no such judgment has yet emanated from the Court of Appeal, despite the delay in finalising this determination.

30.
If the Tribunal was against him on the adjournment application, Mr Wilford set out his IGS Transitional Arrangements argument, based on the email chain. The appellant had received legal advice from her previous legal representatives; he had no instructions as to whether that advice was erroneous. Whether or not the appellant had been aware of the email chain, there was a clear ambiguity between that and the Respondent's guidance. He asked the Tribunal to allow the appeal and substitute a decision in the appellant's favour.

31.
For the Secretary of State, Ms Kiss noted that the witness statement now produced was almost a year old, and was at best muddled. The appellant had not attended the hearing to clarify her evidence, although she had been present at the first hearing of the appeal. The evidence in relation to the appellant's former solicitors' actions and advice did not come close to the standard set in BT (Former solicitors' alleged misconduct) Nepal [2004] UKIAT 00311 which held that where an appeal is based in whole or in part on allegations about the conduct of former representatives, there must be evidence that those allegations have been put to the former representative, and the Tribunal must be shown either the response or correspondence indicating that there has been no response. The appellant should not be permitted to rely on vague allegations of poor advice by previous representatives, which they had not had an opportunity to comment upon. The Tribunal should give it no weight.

32.
Similarly, in relation to the email chain, there was no evidence that the appellant knew of those emails, still less relied upon them. It was difficult on that basis to see how legitimate expectation could be made out. The emails had no relevance to the present appeal. The only matters which could potentially have influenced the appellant's conduct were the application form, the policy guidance then on the UKBA website, and the Immigration Rules, all of which made it clear that £800 for three months was required. The application form was perfectly clear in its reference to the policy guidance. The appellant completed it, stating that she had £800 and claiming the 10 points for Maintenance (Funds). However inadequate the auto response text which appeared in the email chain until May 2009 (when it was reviewed and brought in line with the policy guidance) the appellant could not have been misled by it because she never saw it.

33.
For those who did receive the auto response emails, the Secretary of State's case was that the application form still made it clear that all applicants should rely on the policy guidance. The emails produced referred to a single applicant (not this appellant) and legitimate expectation required unambiguous reliance, which was not present here. She adopted and relied upon paragraph 34 of SK . The appellant's witness statement had not been updated since May 2009 when the appeal was heard by the original Immigration Judge.

34.
Replying, Mr Wilford said that it was not the case that the policy guidance was now part of the Immigration Rules and he did not seek to rely on it. He sought instead to rely on the Tribunal's determination in an unreported decision, IA/01396/2009. The Tribunal reserved its decision, which we now give.

Discussion

Procedural matters

35. We deal first with the appellant's adjournment request. It appears from documents before us that there has been no attempt to bring this appellant's case up to date since May 2009. She did not attend the hearing and her solicitors apparently have no recent instructions from her. Rule 21 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 sets out when the Tribunal may adjourn an appeal, and was the rule in force on 5 January 2010:

" **21 Adjournment of appeals**

(1) Where a party applies for an adjournment of a hearing of an appeal, he must—

(a) if practicable, notify all other parties of the application;

(b) show good reason why an adjournment is necessary; and

(c) produce evidence of any fact or matter relied upon in support of the application.

(2) The Tribunal must not adjourn a hearing of an appeal on the application of a party, unless satisfied that the appeal cannot otherwise be justly determined.

(3) The Tribunal must not, in particular, adjourn a hearing on the application of a party in order to allow the party more time to produce evidence, unless satisfied that—

(a) the evidence relates to a matter in dispute in the appeal;

(b) it would be unjust to determine the appeal without permitting the party a further opportunity to produce the evidence; and

(c) where the party has failed to comply with directions for the production of the evidence, he has provided a satisfactory explanation for that failure. "

36. The present adjournment application was not on notice. It did not produce evidence of the solicitors' failure to advise correctly and there is no satisfactory explanation for the late application or the failure to provide supporting evidence. We were not satisfied that the appeal could not be justly determined without the opportunity for further instructions to be taken from the appellant. The Tribunal refused to adjourn the hearing.

37. The appellant included in her bundle a number of unreported determinations and her Counsel sought to rely on one of them. The Tribunal's guidance on unreported determinations at the date of hearing was set out in paragraph 17 of the AIT Practice Directions:

"17. Reporting and citation of determinations…

17.7 An application for permission to cite a determination which has not been reported must:

(a) include a **full** transcript of the determination;

(b) identify the proposition for which the determination is to be cited;

(c) certify that the proposition is not found in any reported determination of the Tribunal or of the IAT and has not been superseded by a decision of a higher authority; and

(d) be accompanied by a summary analysis of all other decisions of the Tribunal and all available decisions of higher authority, relating to the same issue, promulgated in the period beginning six months before the date of the decision proposed to be cited and ending two weeks before the date of the hearing. (This analysis is intended to show the trend of Tribunal decisions on the issue)."

38. Nothing remotely like that was done here. The appellant, as before, simply included in her bundle a number of what are now First-tier Tribunal determinations, the outcome of which she and her advisors found satisfactory. We have placed no weight on any unreported determination. There is a fully reasoned reported determination in SK to assist us.

The substantive issues

39. Turning now to the substance of the appeal, the questions are, first, whether in its analysis of the email chain in SK , the Tribunal erred in regarding those emails as disjunctive rather than sequential; and if so, whether there existed an open ended 'transitional arrangement' the effect of which was that the appellant was not only entitled, as an IGS holder, to 85 points for Attributes and English language ability because of her membership of that scheme, but also to the benefit of the transitional arrangement whereby she need only show £800 in her account on a date in the month before the application was made. Subsidiary arguments arose as to the status of the Respondent's policy guidance and whether the appellant had any legitimate expectation of being allowed to remain in the United Kingdom.

40. Beginning with the email chain, we do not consider that it avails this appellant. Its arrival in the hands of her solicitors (with or without the consent of the unnamed applicant whose emails are reproduced) is rather mysterious. The appellant did not rely upon the auto response herself because she never emailed the UKBA and so never received any auto response. If she had, that might be another matter, but that would depend on the facts in such a case and we are not seised of such an appeal.

41. The remaining questions can be taken together. In a nutshell, the appellant argues that by reason of the language of the application form, the policy guidance and or the email chain, she is not required to comply with the Maintenance (Funds) part of the Points-Based System and that, in this respect, SK was wrongly decided. The same email chain was before the Tribunal which heard SK . Tha t appellant was in the same position as this appellant, in that the emails were not addressed to her and she had not personally suffered any misdirection as a result of the auto response. The Tribunal considered the materials which are now before us, though without the multiple dated versions of the online information, application form and policy guidance which Ms Kiss had helpfully retrieved from the UKBA computer system.

42. The application form expressly incorporated the policy guidance, which deals with Maintenance (Funds) under the heading "Maintenance requirement – all applications". The policy guidance forms part of the application process and the appellant is directed on the form, in several places, and on the website, to read it before completing the application. That is the status of the policy guidance.

43. The confusion underlying this appellant's argument is based, we consider, in a conflation of two different transitional arrangements:

(a) The Maintenance (Funds) evidence arrangement which ended on 31 October 2008 allowed those who applied under the new Points-Based System (introduced on 29 February 2008) to show that on the closing date of the bank statement which immediately preceded their application, they had in that account £800 or such larger sum as was appropriate bearing in mind the number of their dependants, provided that the latest bank statement ended within a month of the date of application. That was a practical concession, given that the requirement to show £800 over three months was entirely new and many students, not having expected it, would not have organised their finances in that way;

(b) The IGS and SEGS transitional arrangement for those still on those schemes after 30 June 2008 was an open ended one, allowing them to apply to transfer to Tier 1 (Post-Study Work) and crediting them with 75 points for Attributes and 10 points for English language ability, by reason of their being part of the IGS scheme. Both the IGS and SEGS schemes allowed non-European graduates an additional year in the United Kingdom working and gaining valuable experience. The open ended nature of this second set of transitional arrangements was therefore not as generous as it appeared, since the scheme only lasted for a year, but those who qualified and met the other requirements would be able to claim a further year as Tier 1 (Post-Study Work) Migrants. The Tier 1 (Post-Study Work) application forms and guidance made it perfectly clear that IGS and SEGS holders were required to comply with Maintenance (Funds) (although some of them, who applied before 31 October 2008, might have qualified for the Maintenance (Funds) transitional arrangements also).

44. We consider it much more likely than not that an educated, intelligent person such as this appellant, reading the application form (which gives her in effect 85 points for being on the IGS scheme, and expressly does not require that she prove her English language ability for 10 of them), would understand that she still had to prove that she had the necessary funds available to her throughout the funding period.

45. The appellant's own evidence in her witness statement, made not long after refusal, is, as Ms Kiss contended, less than convincing as to her having misunderstood such requirement. First, without any supporting evidence, she blames her lawyers for poor advice. Second, she asserts that her understanding of the requirement was one or all of the following:

- That the Transitional Arrangements would be applied and she did not need to meet any points requirements; or
- That she only had to demonstrate £800 in her account at the end of each month; or
- That she only had to demonstrate £800 in her account on the date of her Points-Based System application.

46. If the appellant had misunderstood or been misled, then at that date, just a few months after her application, we consider that she would have known which one of those three rather different arguments she wanted to make. The use of all three does not indicate to us that she really held any such conviction.

47. We turn to SK for assistance with the legitimate expectation point:

"34. Of particular clarity and brevity as to the approach to be adopted in assessing this concept is the guidance offered by Schiemann LJ in R v Newham Borough Council ex parte Bibi [2003] 1 WLR 237 where he states as follows.

"In all legitimate expectation cases, whether substantive or procedural, three practical questions arise. The first question is to what has the public authority, whether by practice or promise, committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do."

35. Applying these principles I conclude, for the reasons given above, first that the Respondent has, neither by practice nor promise, ever committed himself to extending the transitional arrangement relating to maintenance beyond 31 October 2008. I have not found within the documents supplied to me any evidence that he has expressly or impliedly given a contrary impression. I have no reason to

suppose that the reply given by Ms Bennett of UKBA in her e-mail of 3 December 2008 was not the standard response given by UKBA to anyone inquiring about the transitional arrangement on maintenance. It follows therefore that I also conclude that the Respondent has not acted unlawfully in relation to his commitments on the subject. Thus there is no basis for the Tribunal to intervene on the basis of legitimate expectation, again notwithstanding the contrary submissions made by Ms Laughton."

48. Applying the SK principles to these facts, which are almost identical save for the appellant's own rather confused evidence of her claimed misunderstanding of the various Points-Based System transitional arrangements, we also are satisfied that the Respondent did not, by practice or promise, commit himself to extending the Maintenance (Funds) transitional arrangement beyond 31 October 2008. We bear in mind that the appellant herself gives three different versions of her understanding and we consider that had the Secretary of State committed himself, she would have been able to identify the practice or promise to which he was committed with far greater certainty.

49. The fundamental point here is that the appellant has conflated two sets of transitional provisions. It is right that the transitional arrangements for IGS holders continued up to and including the date of the appellant's application to the Respondent. Those transitional arrangements are very clearly set out in the application form and in the policy guidance and they are, that IGS holders will be given 75 points for attributes and 10 points for English language ability merely because they are already on the IGS scheme, as long as their IGS did not expire before 30 June 2008, which this appellant's did not.

50. The transitional arrangement at the beginning of the Points-Based System in relation to the £800 Maintenance (Funds) requirement was a different one. Until 31 October 2008, an appellant only had to show that at the statement date of her last bank statement before the application, she had a figure in excess of £800 in her account. The reason was that the three month requirement caused a retrospective difficulty for those already in the country and it was considered appropriate to make the test rather easier for a short period while news of the Points-Based System and its requirements settled in. The appellant applied after 31 October 2008 and nothing in the voluminous material before the Tribunal indicates that the Respondent extended this part of the transitional arrangements for the benefit of all IGS holders applying for Tier 1 (Post-Study Work) status after 31 October 2008.

51. For all of the above reasons, we uphold the Immigration Judge's determination.

DECISION

52. For the foregoing reasons, our decision is as follows: The making of the previous decision involved the making of no error on a point of law.

Signed

Senior Immigration Judge Gleeson

Judge of the Upper Tribunal