



Upper Tribunal
Immigration and Asylum Chamber

Appeal Number IA.47245.2013

THE IMMIGRATION ACTS

Heard at: North Shields
On: Friday 11th April 2014
Before

Promulgated on:
Friday 23rd May 2014

Judge Aitken
Deputy Chamber President (HESC)

Between

Mr Henry Iziengbe Imarhiagbe

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr O Jibowu
For the Respondent: Mr J Kingham (Home Office Presenting Officer)

Decision

1. This matter appears before me the appellant having been granted leave by First Tier Tribunal Judge Gotham on 5th March 2014 in the following terms:

"1. By a determination promulgated on 14 February 2014, First-tier Tribunal Judge Doyle dismissed the appellant's appeal against a decision of the respondent. As the judge referred to in his paragraph 8, the outcome of this appeal is dependent on whether the "6 year rule" subparagraph (ha) of paragraph 245ZX of the rules refers simply to the accumulated total of time spent in this country with leave as a student (as the respondent argues) or whether the calculation of the 6 years referred to is more complicated than that (as the appellant argues).

2. *Realistically, the grounds on which the appellant seeks permission to appeal do not seek to suggest that he could succeed by reference to human rights law issues.*
3. *Although the grounds effectively seek to re-run the appellant's argument that failed before the judge, it is my assessment that those grounds are arguable. In particular, I take into account that in the Upper Tribunal determination referred to by the judge - **Islam (Para 245X(ha): five years' study) [2013] UKUT 00608 (IAC)**, circulated on 5 December 2013. the tribunal apparently considered relevant guidance of the respondent dated July 2012 (see paragraphs 12 on of Islam) but, as the grounds suggest, it may be that the respondent's subsequent guidance dated October 2013 calls for the revisiting of some of the principles set out in Islam (at least in so far as those principles are relevant to the outcome of this appeal).*
4. *The appellant should not take this grant of permission as any indication that the appeal will ultimately be successful."*
2. There is argument that the findings of fact as made by the First Tier Tribunal judge were incorrect, they are found at paragraph 11f of his determination of 14th February 2014 and read as follows:
- "11. I find that the material facts relevant to this appeal are as follows -*
- (a) The appellant entered the UK in 2004 to pursue a course of study at Heriot Watt University. The appellant was granted leave to remain in the UK as a student from the 1 September 2004 until 30 November 2008. In November 2008 the appellant graduated with a BSC in Information Systems.*
- (b) The respondent granted the appellant leave to remain in the UK as a post study worker from 14 January 2010 until 14 February 2012.*
- (c) The respondent granted the appellant leave to remain in the UK from 14 August 2012 until 3 October 2013 to pursue a Masters' degree in Business Information Technology at Edinburgh, Napier University.*
- (d) The period from 4 September 2004 until 30 November 2009 is 5 years, 2 months and 28 days. 14 August 2012 until 3 October 2013 is 1 year, 2 months and 16 days.*
- (e) On 2 October 2013, the appellant made an application for leave to remain in the UK for a period of 12 months to pursue a Masters' degree at Stirling University.*
- (f) In September 2013, the Appellant commenced studying towards a Masters' degree at Stirling University. On 31st October 2013, the respondent refused the appellants application for leave to remain.*

(g) the Appellant suspended his degree course at Herriot Watt University for its third year from 2006 to 2007 and resumed studies in the year 2007 to 2008.

(h) The Appellant, between August 2004 and June 2013, has had leave to remain in the UK as a student for 6 years, 6 months and 14 days.

3. The Appellant challenged the refusal on the basis that the grant of leave to remain which he is seeking will not lead to him having spent more than 6 years in the UK as a Tier 4 (General) Migrant or as a Student, studying courses at degree level or above.
4. The Appellant argued that the computation of time "spent" as a Tier 4 (General) Migrant or as a student, studying courses at degree level or above should be achieved by calculating the actual period of leave granted in such category and making deduction for periods when the student was not studying, as prescribed by paragraphs 106 and 94 of the relevant Guidance. In particular a year during which period he had "dropped out" of studying.
5. The Appellant's further argument is that his actual period of study in the UK was 9 months in each academic session as there was usually a 3 months period in each 12 months session presumably accounting for the usual Holiday period. Alternatively that a discount of at least 2 months must be deducted as prescribed by paragraphs 106 and 98 of the Guidance.
6. Mr Jibowu argued the 2 matters, firstly that a year spent not studying during the period when the appellant had study leave ought not to count. He offered circumstances within the grounds where there may be injustices where the whole period of leave was counted where it had not been taken up such as sickness. That was not present in this appellants case, and it does not alter the plain wording of the decision in **Islam** at paragraph 11;

"The appellant had leave as a student for 4 years to pursue his degree course; that he chose to 'drop out' (and not inform UKBA of that fact) does not deny that the whole of the period of leave (excluding pre- and post-course leave granted under para 245ZY(b)) counts towards the maximum 5 year period and whatever he chose to do in that period, he did it during a period of leave as a student. It is the period of the leave and not the actual study which is the measure for calculating the period spent in the UK imposed by para 245ZX(ha)."

7. It is clear therefore that in following the decision in **Islam** on this point the Tribunal Judge made no error of law. Since the period of leave granted

until October 2013 was 6 years 5 months and 14 days as the Tribunal Judge correctly calculated it would be necessary for the Appellant to succeed in both areas, i.e. the deduction of the “Drop out” year and the deduction of the various incorporated leave periods (amounting on Mr Jibowu’s submissions to 16 months) to succeed in demonstrating that the overall period of leave as properly calculated would remain below 6 years. This is because, when an addition year as requested is added the total leave granted would be 7 years 5 months and 14 days, from which the deduction of 16 months (if it were proper to allow it) would leave .6 years 1 month and 14 days and thus would exceed 6 years.

8. Mr Jibowu also submitted that the period of study should have been reset from January 2010 any period before then not counting towards the 6 year maximum (which would reduce the student leave accumulated by 5 years or so) because the Appellant was granted leave to remain to do post study work. That argument relies upon below degree study having a lifetime limit of 3 years and different language being used at the time in the guidance for post study calculations. I do not accept that argument, the language of the rules and guidance is clear and there is no indication that the indention of the drafter was to allow a period of leave for post study work to reset the period in respect of post graduate study, the language may be slightly different, it is however equally clear.
9. There is therefore no error of law within the decision of the Tribunal Judge and the appeal is dismissed



Judge Aitken
Deputy Chamber President (HESC)
Friday, May 23, 2014