



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/47265/2013
IA/47266/2013
IA/48092/2013

THE IMMIGRATION ACTS

Heard at Field House
On 22 July 2014

Determination Promulgated
On 4 August 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

MR ASHFAQ RASOOL KHAN GURMANI (1)
MASTER TAHA HADI KHAN GURMANI (2)
MRS KIRAN FATIMA (3)
(ANONYMITY DIRECTION NOT MADE)

Appellants/Respondents

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent/Appellant

Representation:

For the Appellants: Mr S Ahmed, a Solicitor
For the Respondent: Mr E Tufan, a Home Office Presenting Officer

**DETERMINATION AND REASONS FOR FINDING A MATERIAL ERROR OF
LAW/NO ERROR OR LAW**

Introduction

1. The appellants before the First-tier Tribunal (who are respondents before this Tribunal) are all citizens of Pakistan. The first appellant (Mr Gurmani) is the husband of the third appellant (Mrs Fatima) and the father of the second appellant

(Master Gurmani). The appellant before this Tribunal is the Secretary of State for the Home Department (the Secretary of State).

2. The appellants first came to the UK with entry clearance valid from 10th May 2006. Mrs Fatima had valid entry clearance from 10 May 2007 and, presumably, Master Gurmani, who was born on 2 December 2005, travelled here with his mother in 2007.
3. On the date which does not appear from the application, Mr Gurmani applied for leave to remain as a Tier 4 (General) Student. It appears that Mrs Fatima applied as a Tier 4 (General) Student dependant with Master Gurmani.
4. Those applications were refused by the Secretary of State under paragraphs 245ZX and Rule 319 of the Immigration Rules. The Secretary of State also decided to remove the appellants from the UK.

The Appeal Proceedings

5. On 20 November 2013 the appellants, having paid the correct fee, sought to appeal the Secretary of State's refusal of further leave to remain in each case. The hearing came before First-tier Tribunal Judge Adio (the Immigration Judge) at Hatton Cross on 15 April 2014. His determination was promulgated on 1 May 2014. The Immigration Judge found that the total period Mr Gurmani had been within the UK was 22 months.

Proceedings before the Upper Tribunal

6. Following the promulgation of the decision of the First-tier Tribunal, the Secretary of State gave notice of appeal to the Upper Tribunal, which was received on 12 May 2014. The Secretary of State cited the following grounds:
 - (1) she disputed that the First-tier Tribunal had jurisdiction to determine the appeal on the correct application of Section 88(2) of the Nationality, Immigration and Asylum Act 2002;
 - (2) the Immigration Judge's calculation of time for the purposes of identifying whether Mr Gurmani had spent five years within the UK was flawed.
7. The application for permission to appeal to the Upper Tribunal was considered by Designated Judge of the First-tier Tribunal McClure who decided that:
 - (1) as the appellants were seeking to remain in the UK for a period beyond 2015 it was arguable that they were seeking to remain beyond the time permitted by the Rules;
 - (2) although he had reservations, the DIJ also thought it arguable by the Secretary of State that a further period of study was not permitted under the Rules and

therefore there was no right of appeal under Section 88(2)(a) - (d) of the 2002 Act. All grounds were therefore allowed to be argued before the Upper Tribunal.

8. Standard directions were sent out on 23 May 2014 indicating that the Tribunal would determine the appeal but the Upper Tribunal would not hear fresh evidence without an application indicating the nature of that evidence and explaining why it was not submitted before the First-tier Tribunal. Directions were sent out on 17 June 2014. The hearing was fixed for 22 July 2014 at 10am.

The Hearing

9. Unfortunately, neither party's submissions were easy to follow. As I indicated to the advocates, it would have been helpful to have a skeleton argument setting out the issues in the appeal and the arguments of law. However, since the hearing, helpfully, Mr Ahmed has sent a skeleton argument to the Tribunal, which was received on 24th July 2014.
10. As I understand the Secretary of State's argument, it is that Section 88 excludes the right of appeal in Section 82(1) of the 2002 Act against certain types of decision, including a person who is seeking to remain in the UK for a period other than one permitted within the Immigration Rules. The maximum period set by paragraph 245ZX (ha) of the Immigration Rules is a period of five years so that the grant of leave to remain as a Tier 4 (General) Migrant or as a student on a course of degree level or above must not lead to the applicant having spent more than five years in the UK studying on degree courses or above. This is subject to certain exceptions. It was not contended that any of the exceptions applied here. I was referred to the case of **Islam [2013] UKUT 608 (IAC)** by Mr Tufan. However, there the issue before the Tribunal was whether the time that Mr Islam had spent studying on a degree level course prior to the introduction of the Tier 4 scheme counted towards the calculation of the five years. The Upper Tribunal decided that it did and accordingly the Judge of the First-tier Tribunal had been correct to dismiss his appeal.
11. Mr Tufan submitted that it was the period of time actually spent in the UK that counted towards the calculation of the period, not the time spent studying.
12. I then heard from Mr Ahmed, a solicitor instructed on behalf of the appellants. He submitted that the period of time ought to relate to the "actual period" here whilst studying for a degree. The case of **AM [2009] UKAIT 2** did not support the contention that the correct approach was to look at the period actually spent studying without calculating the actual period spent on the degree course.
13. The Secretary of State's calculation was that Mr Gurmani had spent three years, six months and ten days in the UK and therefore a further grant of leave to remain for eighteen months would take him over the five years. The question before the Tribunal therefore was how this time had been calculated? It was submitted that the

way through all this confusion was to look at the judge's determination at paragraphs 16 - 17. In particular, at paragraph 17 he had correctly calculated the period as being 22 months in total. The guidance supported the Immigration Judge's approach as being clear and correct. The present course Mr Gurmani was on lasted less than five years.

14. I allowed Mr Tufan a right of reply. He said the relevant chronology here was that the appellant had been granted various periods of leave to remain from 10 September 2008 until 9 September 2013, when the current application was made. The latest application took the appellant over the five year period. I was referred by Mr Tufan to one of the appellant's own documents at page 19 of his bundle produced for the hearing before the First-tier Tribunal. This suggested that the commencement of study was 3 September 2008 at the London College of Business and Technology. The appellant had not been studying for a degree course for the whole duration of his presence in the UK.
15. Having considered the matter for a few minutes I decided to reserve my decision as to whether there was a material error by the First-tier Tribunal.

Discussion

16. Paragraph 245ZX of the Immigration Rules requires students to comply with the requirements of paragraph (ha). That subparagraph provides for a maximum period of five years in the UK "as a Tier 4 (General) Migrant, or as a student, studying courses at degree level or above ..." I understand that none of the exceptions to that requirement apply here.
17. The appellants' appeal rights against an immigration decision are curtailed where he is seeking to be in the United Kingdom for a period greater than that permitted by the Immigration Rules (i.e. five years).
18. There are exceptions to Section 88(2) contained in Section 88(4). These include racial discrimination, an argument that the decision is contrary to the Human Rights Convention or that the appellant is a refugee within the Refugee Convention. None of those exceptions appear to apply here.
19. The calculation of the five years for the purposes of the Tier 4 scheme is a difficult matter but, with respect, I found the Immigration Judge's calculation in paragraphs 16 and 17 somewhat convoluted. Paragraph 245ZX(ha) states that the "grant of leave to remain ... must not lead to the applicant having spent more than five years in the UK as a Tier 4 (General) Migrant, or as a student, studying courses at degree level or above". Thus it is only the period of time within the UK studying at degree level or above that is to be counted.
20. Assuming the first period of study is ignored (10 May 2006 - 14 September 2008), presumably on the basis that NQF3 is not a degree or equivalent to degree level,

nevertheless the appellant spent the following periods in the UK for the purposes of study at degree level or above:

- 21 November 2008 – 30 November 2009 (approximately twelve months).
- 25 January 2010 – 4 July 2011 (approximately eighteen months).
- August 2012 – 9 September 2013 (approximately thirteen months).

21. The most recent application, which results in the present appeal, was to study for eighteen months from 2 October 2013 – 2 April 2015 (a further eighteen month period). By my calculation therefore, based on Mr Gurmani's witness statement, he had spent at least three years, six months and ten days in the UK at the time of his application and a further application would result in him being here more than the five years permitted by the Immigration Rules. Accordingly, the appellant had no right of appeal under Section 82(1) of the 2002 Act and the calculation within the determination of the First-tier Tribunal appears incorrect. As a person whose application resulted in him having to spend more than five years in the UK studying courses at degree level or above the Immigration Judge ought to have dismissed the appellants' appeals against the Secretary of State's decision to refuse them further leave to remain and he ought to have found that there was no appeal right.

Decision

The decision of the First-tier Tribunal contains a material error of law. The Secretary of State's appeal against that decision is allowed. I substitute my decision which is that the appellants' appeal against the decision of the Secretary of State to refuse further leave to remain is dismissed.

Anonymity direction not made.

Fee Award

The appellants were awarded their fees of £420. I set aside that decision having regard to the fact that this appeal by the Secretary of State has succeeded.

Signed

Date

Deputy Upper Tribunal Judge Hanbury