



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/43585/2014

THE IMMIGRATION ACTS

Heard at Field House
On 16 February 2016

Decision & Reasons Promulgated
On 03 March 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

MD SULTANUR AREFIN ISLAM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr I Rahman, Legal Representative from JKR Solicitors

For the Respondent: Ms N Willocks-Briscoe, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Atreya (the judge), promulgated on 24 June 2015, in which she dismissed the Appellant's appeal. That appeal was against the Respondent's combined decisions of 11 September 2014, refusing to vary leave to remain as a Tier 4 Student and to remove the Appellant from the United Kingdom under section 47 of the Immigration, Asylum and Nationality Act 2006.

2. The Appellant had spent some time in this country as a student. He had undertaken a number of course at degree level or above. In addition he had sought to undertake two courses but had been unable to complete them because the Respondent revoked the institution's licences and curtailed the Appellant's leave.
3. The Appellant made his last application for further leave to remain as a student on 28 June 2014. In refusing the application the Respondent concluded that when the latest proposed course of studies was accounted for, a resulting grant of leave would entail the Appellant having spent more than five years in the United Kingdom as a student undertaking course at degree level or above. Therefore he could not satisfy paragraph 245ZX(ha) of the Immigration Rules (the Rules).

The relevant Rule

4. As at the date of the Respondent's decision, paragraph 245ZX(ha) read:

'If the course is at degree level or above, the grant of leave to remain the applicant is seeking must not lead to the applicant having spent more than 5 years in the UK as a Tier 4 (General) Migrant, or as a Student, studying courses at degree level or above unless:'
5. It is common ground that none of the exemptions contained in the remainder of the paragraph are relevant to the Appellant's case.

The judge's decision

6. The sole issue before the judge was whether the Appellant fell foul of the time limit under paragraph 245ZX(ha) (see paragraph 15 of the decision).
7. It was argued on the Appellant's behalf that the periods of leave granted in respect of two courses (those at LCSMS and Kimberley College) should have been disregarded for the purposes of calculating the time limit. This was because the Respondent had revoked the institution's licence and therefore the Appellant was precluded from undertaking the courses. It was submitted that time should be calculated on the basis of "actual study" (see paragraph 18).
8. Having considered the evidence before her, the wording of paragraph 245ZX(ha), and the Respondent's guidance on Tier 4 (the contents of which were said to be identical to that in the guidance applicable at the date of decision), the judge found that the courses at LCSMS and Kimberley College were to be taken into account. She concluded that there was no provision in the Rules or the guidance which allowed for the discounting of periods of leave at institutions whose licences had been revoked. Thus, it was said that the Appellant was caught by the five-year bar, notwithstanding that this appeared to have unfair consequences (see paragraphs 31-40).
9. Article 8 was dealt with briefly at paragraph 41.

The grounds of appeal and grant of permission

10. The grounds contend that paragraph 245ZX(ha) should be read as meaning that only periods actually spent on studies are to be taken into account when calculating

time under this provision. It is said that the wording of the Respondent's guidance supports this position. The conclusions on Article 8 were not challenged.

11. Permission to appeal was initially refused by the First-tier Tribunal but granted on a somewhat tentative basis by Upper Tribunal Judge King on 25 November 2015. He found the calculations made by the judge and the Appellant unclear. The Appellant's representatives were advised that they must provide further details on the courses undertaken and the periods of leave granted.

The hearing before me

12. Mr Rahman provided a schedule detailing the various institutions at which the Appellant had studied (or sought to study), the periods of leave granted by the Respondent, and the periods of "actual study". It was unclear to me whether this last calculation related to time spent by the Appellant in actual study or to the length of the respective courses. When asked to clarify, Mr Rahman appeared to suggest the former, but having looked at the various documents in the Appellant's bundle, I am satisfied that the figures in fact represent the duration of the courses.
13. Mr Rahman accepted that the total leave afforded to the Appellant (including that sought by the latest application) would exceed five years. He also accepted that the total duration of all the courses would exceed the limit. In essence, his primary position appeared to be that only time spent actually studying at the institutions should count towards the calculation of time under paragraph 245ZX(ha). He relied on the wording of the Respondent's guidance at paragraph 103, which suggests that the length of the course is the relevant figure for calculating overall time. He expressly stated, when asked, that the comments of the Upper Tribunal at paragraph of Islam (Para 245X(ha): five years' study) [2013] UKUT 00608 (IAC) are wrong. Mr Rahman confirmed that there had been no 'free-standing' fairness submission made to the judge beyond what was said about the construction of the Rule and the contents of the guidance. As a final point he suggested that if leave is curtailed, there is no grant of leave left and so this must be accounted for when calculating time.
14. Ms Willocks-Briscoe submitted that the wording of paragraph 245ZX(ha) is clear, as it that of the guidance: there are no exemptions in respect of situations in which the sponsor's licence has been revoked. The judge was right to have concluded in the way she did and there is no error of law. Whether one looks at the length of leave granted or the length of the courses themselves, the five-year limit is passed and so the Appellant had to fail. She also suggested that leave extended by operation of section 3C of the Immigration Act 1971 could also be accounted for.

Decision on error of law

15. I have decided that the judge did materially err in law. My reasons for this decision involve going through a number of issues in turn.

The interpretation of paragraph 245ZX(ha)

16. I start by considering whether the judge erred in her application of paragraph 245ZX(ha) of the Rules. I conclude that it is wrong to suggest that for the purposes of calculating time under this provision only actual time spent studying can be counted.

The correct interpretation of paragraph 245ZX(ha) is that it is the *leave as a student or a Tier 4 Migrant* which must be added up when calculating time, subject to paragraph 245ZY(a) – (b) (see below). This is so for the following reasons.

17. First, the natural and ordinary words used in the provision are clear enough. There is express reference to the “grant of leave” being sought, not the “length of course”, as could have been provided for. This is a good indication that it is the leave which is to be counted, rather than the length of courses or actual time spent studying on the courses. Further, the five-year maximum is clearly linked to the applicant’s status in the United Kingdom as a Tier 4 Migrant or a student. In both cases the status only exists because of a grant of leave, not on the basis simply that the applicant is on any particular course of studies. Again, the connection between leave and the calculation of time is strong.
18. Second, as Islam expressly decides, leave as a student prior to the PBS coming into existence in March 2009 does fall to be counted when calculating time. Therefore, use of the word “student” in paragraph 245ZX(ha) does not assist Mr Rahman’s argument. In addition, the period of leave granted to the Appellant in 2008 is to be counted for the purposes of paragraph 245ZX(ha).
19. Third, the phrase “studying courses” in paragraph 245ZX(ha) is simply a statement of fact as regards of the level of course which will have led to the grant of leave.
20. Fourth, although strictly speaking *obiter* on this particular point, the Upper Tribunal (which included the Vice-President) in Islam was clear in its view (at paragraph 11):

“...Mr Ahmed did not suggest in his oral submissions that only the appellant’s time actually spent studying should be taken into account. (We did not understand Mr Ahmed to pursue the point made in para 12 of the grounds.) The evidence was that the appellant had ‘dropped out’ of his BSc course after 2 years. Again, in our judgment, that is correct. 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).”

(underlining in the original)

21. This passage supports my interpretation of paragraph 245ZX(ha).
22. Fifth, it is well-settled law that guidance issued by the Respondent is not a tool to be used for the interpretation of the Rules. The guidance relied on by Mr Rahman does not assist his argument on paragraph 245ZX(ha).
23. In light of the above, the judge did not err in concluding that paragraph 245ZX(ha) relates to leave granted, not the actual time spent on studies.

Relevance of curtailment of leave

24. The next issue is whether the *whole* of the periods of leave grant to the Appellant in relation to LCSMS and Kimberley College should have been counted notwithstanding that the Respondent curtailed both periods of leave.
25. It seems to me only logical and fair that if the calculation of time is based upon leave (as I find it is, and as the Respondent has contended), a curtailment of leave must be taken into account: the Respondent cannot have it all ways at once.
26. From a fair reading of the judge's decision, she has not taken cognisance of the curtailed leave in respect of the courses at LCSMS and Kimberley College. In this regard, she has erred. I would note that the Respondent also seems to have failed to take the curtailed leave into account.
27. Unfortunately, Mr Rahman had not endeavoured to provide me with calculations as to the total leave, taking the curtailment into account. I have undertaken this calculation based upon the following figures (the names of the relevant institutions are stated on Mr Rahman's schedule):

<u>Grant of leave</u>	<u>Days</u>
8 September 2008 to 31 December 2009	480
24 March 2010 to 1 October 2010	192
3 February 2011 to 28 January 2012	360
30 March 2012 to 1 June 2013 (curtailed expiry)	429
22 August 2013 to 30 June 2014 (curtailed expiry)	313
Prospective leave for latest course (based upon length of course only)	490
Total	2264

28. This total figure results in a period of leave in excess of six years.
29. It would appear as though the judge's error on the application of paragraph 245ZX(ha) is immaterial. However, having regard to what I say below, this is not the case.

Paragraph 245ZY of the Rules

30. The Rules, as they stood at the date of the Respondent's decision and the hearing, contained paragraph 245ZY(a)-(b), which states:
- (a) Subject to paragraphs (b), (ba) and (c) below, leave to remain will be granted for the duration of the course.
- (b) In addition to the period of leave to remain granted in accordance with paragraph (a), leave to remain will also be granted for the periods set out in the following table. Notes to accompany the table appear below the table.

Type of course	Period of leave to remain to be granted before the course starts	Period of leave to remain to be granted after the course ends
12 months or more	1 month	4 months
6 months or more but less than 12 months	1 month	2 months

...

(iii) The additional periods of leave to remain granted further to the table above will be disregarded for the purposes of calculating whether a migrant has exceeded the limits specified at 245ZX(h) to 245ZX(hb).

31. Neither the Respondent nor the judge appears to have taken account of this provision. Certainly there is no indication in the reasons for refusal letter and the judge's decision that appropriate disregards have been factored into the calculations. In fairness to the judge, I doubt very much whether paragraph 245ZY was brought to her attention at the hearing.
32. I have considered attempting to once again re-calculate the figures, taking into account paragraph 245ZY(b)(iii). However, I am not prepared to do so. Neither party has sought to assist in alerting me to the issue, much less provide me with relevant periods. In addition, it is very difficult to make out with sufficient clarity how relevant disregards are to be applied in this appeal. The most I can say is that if paragraph 245ZY(b)(iii) had been applied, it may have affected the outcome of the Appellant's case.
33. In light of the above, I conclude that, through no fault of her own, the judge did materially err in law by failing to consider and apply paragraph 245ZY(b)(iii) of the Rules. It is right to say that the error occurred because of the Respondent's own failings.

The Respondent's guidance

34. Given my conclusion above, I mention the guidance for two reasons only. Paragraph 103 of the document shows that relevant disregards are to be applied when calculating time. This aspect of the guidance was not taken into account by the judge (or the Respondent).
35. Second, reliance on the guidance formed part of the grounds of appeal and paragraph 103 expressly states that certain periods are to be disregarded. Thus, whilst the manner in which this point has been put forward by the Appellant is less than clear, the general issue relating to the correct calculation of time is before me.

The section 3C leave issue

36. Nothing is said in the reasons for refusal letter about the inclusion of any section 3C leave in the calculation of time. I see no reference to the point in any of the papers before the judge or in submissions made to her. There is no mention of it in the Respondent's rule 24 response. The Respondent's guidance, as it stood at all relevant times, says nothing about such leave being counted.
37. In these circumstances the 3C leave issue does not affect my conclusion that the judge materially erred in her decision.

Conclusion

38. Taking all of the above into account, I set aside the judge's decision.

Remaking the decision

39. Both representatives agreed that I could remake the decision based upon the evidence before me. Aside from the schedule provided by Mr Rahman (which is only of limited assistance given what I have said previously), there is nothing new from either party.
40. I conclude that the Respondent's decision of 11 September 2014 was not otherwise in accordance with the law. My reasons for this are as follows.
41. First, having regard to what I have said when deciding the error of law issue, the Respondent failed to consider paragraph 245ZX(ha) correctly because she took no account (as far as I can see) of the two curtailments of leave. Whilst on my own calculations this may not have made a material difference to the outcome of the appeal (and so perhaps the application as well), it was an error nonetheless.
42. Second, and more importantly, a further error occurred when the Respondent failed to apply the disregards under paragraph 245ZY(b)(iii) of the Rules and her own guidance. In terms of the Appellant's appeal, I have decided that this error (as committed by the judge) was material. It follows that the Respondent's initial error was also probably material.
43. The Respondent will need to make a fresh decision in light of my decision.
44. In so doing, she must set out clearly the periods taken into account and those which fall to be disregarded. All relevant provisions of the Rules must be considered, and current guidance accurately applied.

Anonymity

45. No direction has previously been made and none has been sought from me. There is no need to make a direction and I do not do so.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision of the First-tier Tribunal.

I re-make the decision by allowing the Appellant's appeal to the limited extent that the Respondent's decision was not otherwise in accordance with the law, and the Appellant's application made on 28 June 2014 remains outstanding before the Respondent awaiting a lawful decision.

Directions

- 1. When making a new decision on the Appellant's application, the Respondent shall apply paragraph 245ZX(ha) of the Immigration Rules in light of my decision;**
- 2. When making a new decision on the Appellant's application, the Respondent shall apply paragraph 245ZY(a) - (b) of the Immigration Rules;**
- 3. The current guidance on Tier 4 must be applied;**
- 4. The new decision shall be taken no sooner than 6 weeks from the promulgation of my decision. Prior to this, the Appellant has the option of submitting to the Respondent any further representations and/or evidence relied upon.**

Signed

Date: 26 February 2016

H B Norton-Taylor
Deputy Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a limited fee award of £40.00. Whilst the Respondent failed to consider the Appellant's application correctly, that application was not bound to succeed and the Appellant's own arguments on appeal have been flawed.

Signed

Date: 26 February 2016

Judge H B Norton-Taylor
Deputy Judge of the Upper Tribunal