



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/28657/2013

THE IMMIGRATION ACTS

Heard at Field House
On May 30, 2014

Determination Promulgated
On June 2, 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MOHAMMAD TAJUL ISLAM
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr Saunders (Home Office Presenting Officer)
For the Respondent: Mr Bhuiyan (Legal Representative)

DETERMINATION AND REASONS

1. Although this is an appeal by the Secretary of State for the Home Department I will refer below to the parties as they were identified at the First-tier Hearing namely the Secretary of State for the Home Department will from hereon be referred to as the respondent and Mr Mohammad Tajul Islam as the appellant.

2. The appellant, born January 1, 1977, is a citizen of Bangladesh. On January 8, 2005 the appellant came to the United Kingdom as a student. His leave to remain was until October 31, 2007. This leave was extended on November 27, 2007 to enable him to undertake a level 6 BBA course (degree course) and allowed him to remain in the United Kingdom until December 31, 2008. He applied to extend his leave further and he was allowed to remain here as a student until February 28, 2010 and then on April 8, 2010 he was given leave to remain as tier 4 student until April 30, 2011. He was then granted leave to remain as a Tier 1 (post study work) migrant until May 19, 2013 and on May 17, 2013 he applied for leave to remain as a Tier 4 (General) Student Migrant.
3. The respondent refused this application on June 28, 2013 on the basis he did not satisfy paragraph 245ZX(ha) HC 395. He was also served with a decision to remove him by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006.
4. On July 9, 2013 the appellant appealed under section 82(1) of the Nationality, Immigration and Asylum Act 2002 under the Immigration Rules and human rights grounds.
5. The matter was listed before Judge of the First-tier Tribunal Suchak (hereinafter referred to as "the FtIJ") on January 29, 2014 and in a determination promulgated on February 10, 2014 he allowed his appeal under the Immigration Rules.
6. The respondent appealed that decision on February 17, 2014. Permission to appeal was granted by Judge of the First-tier Tribunal Cruthers on April 8, 2014.
7. The matter was listed before me on the above date and the appellant was in attendance.

SUBMISSIONS

8. Mr Saunders relied on the authority of Islam (Paragraph 245ZX(ha): five years study) [2013] UKUT 00608. The Tribunal made clear that it was not the period of study but the period of leave to remain as a student that counted. For the purposes of calculating whether the new course would take him over the maximum period of study at degree level (60 months) the Tribunal should look to when he was granted leave to remain as a student/Tier 4 for degree purposes. This appellant had been granted leave initially until October 31, 2007. Part of this leave was for non-degree purposes and this should be ignored. He commenced his "degree" course on January 22, 2007 and any periods of leave thereafter in the country as a student or Tier 4 counted towards his 60 months. He

remained in this country as a student/Tier 4 until his leave was varied on May 19, 2011. This meant he had been granted leave to remain for study purposes for 52 months (January 2007 to May 2011). His current course would take him over the maximum 60-month period as it was a fourteen-month course. The FtTJ erred in dealing with the case as he did because he failed to apply the principles of Islam.

9. Mr Bhuiyan adopted his skeleton argument and submitted the facts of this appeal could be distinguished from Islam because firstly the applicant in that appeal “dropped out” and secondly Islam does not address the fees incurred by the applicant. The decision in Islam also failed to have regard to the fact he had been given leave to study for a non-degree course and had “upgraded” his studies whilst here in the United Kingdom. It was unfair to attribute the two years of study that led to no qualification when no blame for this could be attached to the appellant himself. The college was suspended and subsequently had its licence revoked.
10. I reserved my decision on the error of law although I did take submissions from both representatives on both the Immigration Rules for private life purposes and article 8 ECHR.

ERROR OF LAW ASSESSMENT

11. The appellant’s immigration history was helpfully set out in Mr Bhuiyan’s skeleton argument. The appellant came to the United Kingdom in 2005 to study English and having completed that course he then studied for a diploma before applying to study a degree course at London Reading College. His leave to remain was extended and instead of completing his three years course he ended his course after two years because the college’s licence was suspended in January 2009 and then revoked in April 2009. He remained in the United Kingdom when the college’s licence was revoked and then chose to study an MBA in banking and finance at Kensington College of Business. This course commenced on September 21, 2009 and he received his results in January 2011.
12. The Tribunal in Islam considered a different set of facts but it follows that facts in cases are generally different and it is the principle that counts. The Tribunal in Islam considered paragraph 245ZX(ha) HC 395. The issue they had to consider was whether it was the period of study and period of time in the United Kingdom that counted towards the 60-month period. The Tribunal acknowledged that courses that fell below degree level did not count towards the 60 month period but at paragraph [7] of their determination the Tribunal found-

“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 paragraph 245ZX(ha).”

13. The Tribunal went onto consider whether the guidance would assist that applicant and they concluded at paragraph [17]-

“... It states that a person who is a “Tier 4 student” can only study at degree level or above for a maximum of five years. It does not exclude time spent in the past studying under the pre-tier 4 rules....”

14. Mr Bhuiyan sought to distinguish this appeal from the decision of Islam. I disagree with his submission that they are distinguishable. The Immigration Rules place a limit on the period of time a student has to complete degree studies. That limit is five years. Whilst it was not the appellant’s fault that his college lost its licence he would have been aware that he had a limited period of time to complete his degree studies. There are provisions for further studies at a higher level but they do affect this appeal. It is unclear why the appellant was unable to transfer to a different college to conclude this course or why he chose to study a different course in September 2009 but the simple facts of this case are the proposed course would take him over the maximum period of sixty months.
15. I am satisfied the Rules make it clear what has to be achieved and this appellant did not meet the Rules when he applied to extend his current leave.
16. The FtTJ did not have regard to the decision of Islam in his determination. He was not helped by the lack of a presenting officer who may have brought the decision to his attention. The FtTJ concluded in paragraph [13] that the appellant had only spent 43 months undertaking studies at degree level or more. This was the wrong test to apply as confirmed by the Tribunal in Islam.
17. I therefore find there has been an error of law in respect of his decision on the Immigration Rules.
18. As the appellant cannot satisfy paragraph 245ZX(ha) HC 395 his appeal to extend his stay as a Tier 4 student is dismissed.

SUBMISSIONS ON PRIVATE AND FAMILY LIFE

19. The FtTJ did not consider article 8 ECHR because he found it unnecessary to consider the claim under article 8 because he allowed it under the Immigration Rules. There was no cross-appeal but it follows

that if I am being asked to remake the decision then I should give consideration to family and private life under the Rules.

20. It has not been argued at all that this appellant would satisfy either Appendix FM or paragraph 276ADE HC 395. The appellant has argued that he has established private life.

21. The Tribunal in Gulshan at paragraph [24]-

“Drawing the threads together, and not without some difficulty, we conclude that on the current state of the authorities:

(a) ... ;

(b) after applying the requirements of the rules, only if there may arguably be good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them: Nagre;

(c) the term “insurmountable obstacles” in provisions such as Section EX.1 are not obstacles which are impossible to surmount: MF (Nigeria); they concern the practical possibilities of relocation. In the absence of such insurmountable obstacles, if removal is to be disproportionate it is necessary to show other non-standard and particular features demonstrating that removal will be unjustifiably harsh: Nagre.”

22. The Tribunal stated in Shahzad (Article 8: legitimate aim) [2014] UKUT 00085 (IAC) at paragraph [31] :

“Where an area of the rules does not have such an express mechanism, the approach in R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin) ([29]-[31] in particular and Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC) should be followed: i.e. after applying the requirements of the rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them.”

23. The following evidence was before me:-

- a. The appellant came to the United Kingdom with limited leave to remain in 2005.
- b. Since 2005 he has undertaken a number of courses and also remained as a Tier 1 (Post Study Work) migrant.
- c. His application to remain as a Tier 4 student has been rejected.

- d. He has spent money on his courses.
- e. He has successfully completed a number of the modules in respect of his current studies.
- f. His family live in Bangladesh.
- g. He has no family in the United Kingdom.

ARE THERE ANY COMPELLING FACTORS TO ENABLE CONSIDERATION OUTSIDE THE RULES

24. I cannot lose sight of the fact that this is an application to extend a period of stay to further his studies. The Tribunal in Nasim and others (Article 8) [2014] UKUT 00025 (IAC) considered a variety of circumstances for the purposes of article 8 ECHR. The Tribunal made the following findings-

20. We therefore agree with Mr Jarvis that [57] of Patel and Others is a significant exhortation from the Supreme Court to re-focus attention on the nature and purpose of Article 8 and, in particular, to recognise its limited utility to an individual where one has moved along the continuum, from that Article's core area of operation towards what might be described as its fuzzy penumbra. The limitation arises, both from what will at that point normally be the tangential effect on the individual of the proposed interference and from the fact that, unless there are particular reasons to reduce the public interest of enforcing immigration controls, that interest will consequently prevail in striking the proportionality balance (even assuming that stage is reached).

40. ... Furthermore, it is important to emphasise that the appellant in CDS was faced with a hypothetical removal, which would have prevented her from completing the course of study for which she had been given leave. In the present cases, each of the appellants has finished the course (or latest course) to which their leave to remain as a student related...."

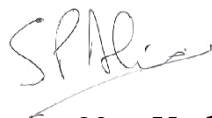
25. The appellant has completed his studies and has undertaken post study work. He was not in the middle of any course when he applied to extend his stay. His leave was about to expire and he sought to extend his stay further as a student. The fact he has continued to study throughout these proceedings was a choice he took and which the college clearly facilitated. However, at the time he commenced these studies he had completed his previous studies and carried out post study work.
26. If the appellant met the Rules his application would have been granted. The fact he met part of the Rules does not mean his appeal should be

allowed either within or outside of the Rules. The appellant has studied and worked here and no doubt he has made friends.

27. I find nothing in the facts of this case that persuade me to consider the case outside of the Immigration Rules (applying Gulshan) and in those circumstances I have not considered this appeal outside of the Rules.

DECISION

28. There was a material error of law. I set aside the FtTJ's decision.



29. I dismiss the appeal under the Immigration Rules.

30. Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) the appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. No order has been made and no request for an order was submitted to me.

Signed:

Dated: **23 June 2014**



Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT

I make no fee award.

Signed:

Dated: **23 June 2014**

Deputy Upper Tribunal Judge Alis