



IAC-FH-CK-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: IA/50312/2014
IA/50317/2014
IA/50318/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 15 April 2016**

**Decision &
Promulgated
On 28 April 2016**

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

**MRS HARVINDER KAUR SALL
MR AMRINDER SINGH
[J K]
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr T Tabori, Counsel, instructed by Glen Solicitors
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are citizens of India. The first appellant was born on 8 April 1981, the second appellant on 31 July 1985 and the third appellant is their daughter born on [] 2011. They applied for further leave to remain as Tier 4 (General) Students and dependents on 6 October 2014 which was

refused by the respondent on 28 November 2014. First-tier Tribunal Judge Moxon in a determination dated 19 August 2015 dismissed the appellants' appeal.

2. Permission to appeal was granted by Upper Tribunal Judge Rintoul, who stated that it is arguable that the core issue as the appellant asserts is that her PGD course ended on 7 September 2009. The judge appears to have concluded that was so but following the case of **Islam [2013] UKUT 00608** and the respondent's guidance that was not the end of a period of study. It was arguable that the judge misinterpreted "end date" within the guidance which postdates **Islam**.
3. The First-tier Tribunal Judge in his decision dated 19 August 2015 made the following findings, which I summarise. The findings start at paragraph 14 where he states that the appellant asserts that she undertook the PGD between 15 September 2008 and 7 September 2009 which amounts to eleven months and 22 days. The appellant asserts that the total period of study would therefore be four years, eleven months and 27 days in total. The judge said he therefore has to determine whether the appellant was studying the PGD. The case record sheet in relation to the application for leave dated 21 May 2008, on page 1 of that document, states that the course start date is recorded as 27 May 2008 but at page 4 that the PGD started on 15 September 2008. This corresponds with the appellant's account with the letter provided from the college and therefore it is accepted that the course commenced on 15 September 2008 and not 27 May 2008.
4. The judge found that the appellant had leave between 27 August 2008 and 30 November 2009 to study the PGD which she commenced on 15 September 2008 and "ceased" on 7 September 2009. She notified the respondent of this by way of her application for further leave dated 18 November 2009.
5. The respondent relies on the case of **Islam (Para 245ZX(ha) five years' study) [2013] UKUT 00608 (IAC)** in which a student had leave between September 2005 and 30 November 2009 for four academic years but in fact ceased studying his course after two years, spending the final two years within the United Kingdom but not studying. It was accepted by the Upper Tribunal that he had dropped out after two years but however ruled that the full four years would count towards the five-year period. Home Office guidance issued on 6 November 2014 at page 60 states that:

"To calculate how long a Tier 4 (General) applicant has studied at degree level or above, you must base your calculation on course start date and end dates... When calculating the period, you must not take into account additional periods of leave granted before and after course dates."

6. The judge stated at paragraph 22 that it is clear that “whichever approach I take the appeal must fail”. He stated that:

“It is not in dispute that including the intended course of study the appellant would accrue a total of four years and five days plus whatever is calculated in relation to the PGD. If I were to follow the case of **Islam** I would have to add the total period in which the appellant had leave to study the PGD”,

which is 27 August to 30 November 2009, which is slightly over fifteen months. By this calculation of the course start date and end date equates to almost eighteen months which when added to four years and five days’ results in approximately five and a half years.

7. The other way the judge calculated was at paragraph 23 where he stated that using the course start date of 15 September 2008 as a starting point in which the appellant applied for further leave and 18 November 2009 as the end date. He prefers this approach as it is consistent with both **Islam** and the respondent guidelines and that results in a period of little over fourteen months which when added to four years and five days results in a total of over five years and two months.
8. The judge noted that on the basis of any calculation the appellant does not meet the requirements of the Immigration Rules.
9. The grounds of appeal state the following which I summarise. From 7 September to 27 May 2011, the appellant undertook a diploma in business management which was below degree level. From 6 June 2011 to 6 June 2014 the appellant undertook a degree level bachelor of business administration - entrepreneurial management and this three year, one day is agreed to count towards the five years under the Rules. On 6 October 2014 she applied for a one year and four-day course of study which is at degree level and which would count towards her five years.
10. The judge in his decision at paragraph 16 identified the issue as to when the appellant was studying the PGD. The judge held despite having found as a fact that she commenced the PGD on 15 September and ceased on 7 September 2009 that: “If I was to follow the guidance I would be required to base my calculations on the course start date and the end date, that is 15 September 2008 to 12 March 2010 which equates to almost eighteen months”.
11. The judge also held that his preferred approach was to use the course start date and the date that the appellant applied for further leave, 18 November 2009, as the end date and that this approach was consistent with the approach favoured by the respondent to base the calculations under paragraph 245ZX(ha) on the period of leave and not actual study, the approach favoured by the appellant applying the guidance ignoring the respondent’s own subsequent issued guidance and his preferred

approach involving a composite of both using the course start date of 15 September 2008 as the starting point and the date on which the appellant applied for leave to remain as at the end date.

12. The judge misunderstood the appellant's submission holding that "whichever approach I take the appeal must fail". The appellant's approach was based on the guidance. However, under the guidance when calculating how long a Tier 4 (General) Student applicant has studied at degree level or above the caseworker must use the course start and end dates. In the appellant's case her cessation of study generated her particular end date. If students were held to the original end date not only would that sort of double-counting errors that vitiated the judge's preferred approach but a student who left a four-year degree course a few weeks into their course would be nonetheless be held to have studied, it for four years. The appellant did not merely interrupt her course briefly, she ended her involvement with it, thus generating a course end date within the meaning of the guidance. This is contrasted with the mere interruptions to study considered by the guidance.
13. In relation to interruptions to study the guidance states that "you must include the full course period in the calculation which should only be deducted where there are compelling and compassionate reasons". In summary, the approach set out by the guidance was the correct approach. The judge misinterpreted and misapplied the guidance and misstated the appellant's case and thereby led himself into error in finding that the appellant has exceeded the five-year cap and did not satisfy paragraph 245ZX(ha). It is a narrow point of law but the error committed when determining it caused the judge to refuse the appeal.
14. At the hearing I heard submissions from both parties as to whether there is a material error of law in the determination. Mr Tabori stated that the PGD that the appellant completed and she obtained a diploma, in contradiction to what is said in the grounds of appeal which was the cessation of studies Mr Tabori argued that the appellant succeeded in her PGD, got her diploma and that was the end of a period of study and that is what should count. The appellant never intended to finish her MSc. It was always her intention to do the one year PGD course. 12 March 2010 was the end date of the MSc. The appellant did not interrupt her course. She ended it. End dates of courses are always expected end dates and can never be absolute end dates. He argued that paragraph 245 requires a factual assessment and not a legal fiction. It is when the appellant actually studied and not when the course was supposed to end and she completed her course earlier but the point being that she completed it and did not interrupt it.
15. Mr Melvin in his argument said that the appellant applied for a diploma course before she applied for the MSc and it would appear that the court assumed that the appellant left her course early, that she changed her course. He said that the judge had not made any error of law because

according to the guidance the leave granted was for the full course until 12 March 2010. It was open to the judge to say that that was the end date and which took the appellant over the five-year ceiling.

16. Mr Tabori in his reply stated that she was only studying for the PGD and she did not abort her studies. They naturally ended on 7 September 2009. To say that she was going to study for an MSc is a mischaracterisation. The PGD was leading to an MSc as stated in the letter from the Greenwich College.

Finding as to whether there is an Error of Law in the decision

17. The First-tier Tribunal Judge found that by any calculation the appellant would have remained studying in a degree course for over five years which is the ceiling under the Immigration Rules. This is an appeal and has a very narrow issue as to when was the end date in the application that the appellant made which was from 15 September 2008 and states that it was due to finish on 12 March 2010. It is the evidence of the appellant and it has been argued on her behalf that she finished her course on 7 September and went on to do a diploma course which is below degree level.
18. In the case of **Islam** the appellant in that case stopped studying after two years and continued to live in this country and did not study and it was held that he had dropped out after two years and that the degree course which was supposed to go for four years would count towards the maximum five-year period of study allowed. In the appellant's case it has been argued that she did not drop out of studies but she finished her PGD course and then went on to a diploma course which was below degree level. It is not clear why she did that but, be that as it may, it does not influence any outcome. So if this is to be accepted it would mean that she would have studied for eleven months and 22 days if indeed she ceased her course or she finished her course by 7 September 2009 and by that calculation she would not go over the five-year ceiling.
19. The guidance states the following:

“The additional periods allowed under the course and end date for example two to four months does not count towards the three-year period. However, if the person's study is interrupted for example because the sponsor's licence is revoked the period of interrupted study still counts towards the three years except in compelling and compassionate circumstances.”
20. The appellant does not rely on any compelling and compassionate circumstances because she argues that she meets the requirements of the Immigration Rules because there was no interruption in her studies. She did not drop out. She continued to study in this country.

21. This whole appeal, as Mr Tabori argued, depends on a factual assessment. The guidance further states that “if there is an interruption of study you must include the full course period”. The guidance postdates **Islam** and the guidance is clear that only if the course has been interrupted. The appellant provided a PGD diploma awarded on 23 July 2009 and therefore the fact that a diploma has been awarded shows successful completion of a course.
22. It would appear from the decision of the judge that he assumed that the appellant ceased studying, which is why he calculated the timeline as he did. This might explain the judge’s calculation. So therefore, if the calculation is done the appellant studied her PGD course for eleven months and 22 days. She then studied for three years and one day, which still leaves her with one year and four days remaining before she hits the ceiling of five years.
23. Therefore the upshot is that the judge made a material error of law in misunderstanding the factual matrix of the case. Therefore, the appellant is still within the ceiling of five years and I set aside the decision and I remake it and on the evidence I find that the calculation that I have set out applies to this case and the appellant succeeds in her appeal.

Notice of Decision

Appeal allowed.

No anonymity direction is made.

Signed

Date this 25th day of April 2016

Deputy Upper Tribunal Judge Chana

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 reduced fee award of any fee which has been paid or may be payable.

Signed

Date 25th day of April 2016

Deputy Upper Tribunal Judge Chana