Neutral Citation Number: [2019] EWCA Civ 389

Case No: C6/2016/0823

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
Upper Tribunal Judge Craig
JR/5791/2015

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 March 2019

Before:

LORD JUSTICE FLOYD
and
LADY JUSTICE NICOLA DAVIES

- -

Between:

The Queen on the application of Hasan	**Appellant**
- and -	
The Secretary of State for the Home Department	**Respondent**

- -
- -

Shahadoth Karim (instructed by **Hamlet Solicitors LLP**) for the **Appellant**
Zane Malik (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 21 February 2019
- -

Approved Judgment

Lord Justice Floyd:

1. This is an appeal from the decision of the Upper Tribunal ("UT") (UT Judge Craig) promulgated on 26 January 2016 by which he refused the appellant's application for permission to apply for judicial review of the decision of the respondent, the Secretary of State for the Home Department, to refuse an application for administrative review of an earlier decision refusing the appellant's application for further leave to remain in the United Kingdom as a Tier 4 (General) Student. The issues on the appeal are twofold. First, was the respondent entitled to refuse the appellant an administrative review of an adverse decision on his application for further leave to remain on the grounds that it was made outside the 14 day time limit for applying. Secondly, would the administrative review have in any event been bound to fail because the grant of leave would have resulted in the appellant exceeding the maximum time (5 years) for which leave can be granted to study "*at degree level or above*" as a Tier 4 (General) Student.

The facts

2. The appellant is a citizen of Bangladesh who arrived in the United Kingdom on 9 February 2010, a few days short of his 21st birthday. He had obtained entry clearance until 18 July 2011 to study for a Diploma in Computer Science at the London School of Accountancy and Management. It is common ground that this is not a course at degree level or above. It does not count towards the maximum permitted period.

3. Some time before that leave expired, on 11 November 2010, the appellant applied for leave to remain as a Tier 4 (General) Student. On 22 December 2010 he was granted such leave ("LTR 1") until 28 February 2014, a period of 38 months and 7 days. LTR 1 was granted for the appellant to study for "ACCA Fundamentals to Professionals" at the Higher Education College, Scotland ("the ACCA course"). ACCA is the Association of Chartered Certified Accountants. According to the Certificate of Acceptance for Studies ("CAS"), the ACCA course was to last from 8 November 2010 (before the grant of LTR 1) to 30 October 2013, a period of 1088 days or just short of 3 years. By the end of June 2013, however, the appellant had completed only two of the three basic modules of that course, which modules he contends were not at degree level or above.

4. On 7 January 2014 the appellant applied for and, on 4 February 2014, was granted further leave to remain as a Tier 4 (General) Student until 20 February 2015, a period of 12 months and 17 days ("LTR 2"). That leave was granted for him to study at the University of Sunderland for a course described in the CAS as "BA (Hons) Business Management Top Up" ("the Sunderland course"). The Sunderland course was to last from 20 January 2014 to 20 November 2014, a period of some 10 months or 305 days. There is no dispute that this was a degree level course. Indeed it appears, to the appellant's credit, that it resulted in the grant to him of a BA degree from the University of Sunderland in Business and Management.

5. By this stage the combined periods of the degree level *courses* for which the appellant had obtained leave to remain was some 3 years and 10 months. As will appear from the above chronology, however, the periods of the courses were not coterminous with the periods of leave. Thus the ACCA course began on 8 November 2010, but the appellant was not granted LTR 1 until 22 December 2010, and after the ACCA course

ended on 30 October 2013, LTR1 continued until 28 February 2014. Similarly, the Sunderland course began on 20 January 2014, while LTR 1 was still extant, but LTR 2 was not granted until 4 February 2014. When the Sunderland course ended on 20 November 2014, LTR 2 continued until 20 February 2015. Overall the appellant had unbroken leave to remain as a Tier 4 (General) Migrant from 22 December 2010 to 20 February 2015, a period of some 50 months, or 4 years and 2 months.

6. On 12 January 2015 the appellant made a further application for leave to remain as Tier 4 (General) Student. This application was made in respect of a course at the University of the Highlands and Islands Perth College. That course was a Masters in Business Administration – Aviation ("the Perth MBA") and was expressed to last from 26 January 2016 until 3 June 2018, a period of 521 days. If added to the periods of time for which the two previous courses were expressed to last in their respective CASs, the grant of leave for the Perth MBA would have led to a cumulative total of the *length of the courses* of 1914 days or 5 years and 89 days. An additional period of leave to remain ("LTR3") would also mean that the cumulative periods for which the appellant had had *leave to remain* as a Tier 4 (General) Migrant would exceed 5 years by a much larger margin.

7. In a letter dated 5 February 2015 the respondent refused the application for LTR 3 by reference to paragraph 245ZX(ha) of the Immigration Rules in the following terms:

> "You have failed to meet the requirements of paragraph 245ZX(ha) because:
>
> - You have previously been granted leave to study courses at degree level or above for 3 year(s) and 9 month(s). Your current application is to study Masters in Business Administration (MBA) – Aviation, a SCQF Level 11 Course, until 3 June 2016. A grant of leave to study this course would result in you having spent more than 5 years in the UK as a Tier 4 (General) Student studying courses that consist of degree level study or above, therefore you fail to meet the requirements of paragraph 245ZX(ha) of the Immigration Rules."

8. I will refer to this decision as "the February decision". The February decision was sent to the appellant at the address he had given in his application for leave to remain as his correspondence address, which was at his college. He also gave another address as the address where he was currently living, but answered the question "*Is this also your correspondence address*" in the negative. There is no dispute that the February decision was deemed under the rules to have been received at the college address on the second working day after the day on which it was posted. On this basis it was deemed to have been received on 10 February 2015, because of an intervening weekend. On 11 March 2015, some 29 days after its deemed receipt, the appellant applied for administrative review of the earlier decision.

9. In his application form for administrative review the appellant answered the question "*When did you receive the Home Office letter with the decision about your application?*" with the date 12 February 2015. In the box providing for an explanation he said:

> "The post was received at the applicant's university address (other than the applicant's) on 12.02.2015, but the Applicant did not have knowledge about it until he received a further letter from the Home Office on 02.03.2015. Once he received the decision he contacted his solicitor immediately. Although, it seems the application for administrative review is being made out of time, the circumstances of the Applicant demands that the rejecting the administrative review would be very unjust as he would not have an opportunity to explain his circumstances. Not only that, the refusal of his application has been based on the miscalculation of some dates. If the dates were counted correctly, the Applicant's application ought to become successful. Therefore, we request you to waive the 15 days (out of time) and accept the application for Administrative Review as being in time"

10. The respondent refused the administrative review in a letter dated 12 March 2015 ("the March decision"). The letter pointed out that the application had not been made in time. The letter included the following in relation to the appellant's explanation of the late filing of the application:

> "You claim that the refusal letter did not reach you in time because it was sent to your educational establishment, however you provided this address as your correspondence address and therefore the Home Office has delivered the letter to the address that you had advised."

The application for judicial review

11. On 14 May 2015 the appellant applied for permission to apply for judicial review. The date of the decision challenged was given as that of the March decision. In a witness statement dated 2 May 2015, however, the appellant identified the February decision as being under attack, and his grounds of application identified both the February and March decisions. The respondent's acknowledgment of service dealt with the challenge to the March decision but pointed out that the purported challenge to the February decision was out of time, and that there was no good reason to extend time. It went on to say that, if the UT decided to extend time, then the challenge to the February decision was misconceived.

12. The permission application was refused on the papers by UT Judge Frances on 24 September 2015. In her short written reasons she dealt only with the challenge to the March decision.

13. The oral renewal came before UT Judge Craig on 26 January 2016. In summarising the facts UT Judge Craig added up the number of days of the ACCA and Sunderland courses (1088 days and 305 days) to reach a total of 1393 days (in excess of 3 years 9 months). He then pointed out that the further 521 days (more than 18 months) to be occupied by the MBA would take the appellant beyond the 5 year limit.

14. Judge Craig then dealt with the two points advanced by the appellant in connection with the March decision to reject the administrative review as being out of time. The

first was that "receipt" in the rule meant actual receipt into the hands of the applicant, not mere deemed receipt. The second was that the respondent should have exercised her discretion to allow the application even though it was out of time. The judge rejected both these contentions. In case he was wrong about that, however, he went on to deal with the argument advanced on the merits. This was that the respondent had wrongly counted time spent on studies below degree level, that is to say those modules of the ACCA course which were below degree level. The judge rejected this argument. He said:

> "… there is nothing irrational about the respondent considering that studies at degree level or above means studies which are being undertaken for the specific purpose of obtaining a degree."

15. Accordingly UTJ Craig concluded that "*even if the administrative review should have been admitted the decision upon it would have been bound to go against him*". He also rejected the application for a further reason, namely that the oral renewal application was itself out of time.

The appeal

16. The appellant is dissatisfied with the judgment of UT Judge Craig, and appeals to this court on two grounds. The first ground is that the UT erred in law in upholding the respondent's rejection of the appellant's application for administrative review for being out of time because that rejection was wrong in law. The second ground is that the respondent misconstrued paragraph 245ZX(ha) of the Immigration Rules by including in her calculation of the 5 year limit time spent by the appellant studying below degree level. Permission to appeal was refused on the papers by Hamblen LJ, but granted by Arden LJ at an oral hearing.

Ground 1: Rejection of the administrative review as out of time

17. Applications for administrative review are governed by paragraph 34 of the Immigration Rules. Paragraph 34R provided, at the material time:

> "(1) The application must be made:
>
> (a) where the applicant is not detained, no more than 14 days after receipt by the applicant of the notice of the eligible decision,
>
> …
>
> (2) But the application may be accepted out of time if the Secretary of State is satisfied that it would be unjust not to waive the time limit and the application was made as soon as reasonably practicable.
>
> (3) For the purposes of this paragraph, where notice of the eligible decision is sent by post to an address in the UK, it is deemed to have been received, unless the contrary is shown, on the second working day after the day on which it was posted"

18. Mr Karim, who appeared for the appellant, submitted that there were two free-standing elements to this ground. The first was that it was clear in his submission, that the rule was referring to actual physical receipt by the applicant and not to service or deemed service. Sub-paragraph (3) of the rule did not deem the decision to have been received by the applicant, it merely provided that the letter was deemed to have arrived at the address to which it was posted.

19. I agree that sub-paragraph (3), read in isolation, merely establishes that a decision is received at a UK address 2 working days after it is sent. On that basis it is common ground that the decision was received at the appellant's university correspondence address on 10 February 2015. That does not go as far as establishing that the decision was in the actual, physical possession of the applicant on that date.

20. I am not, however, able to follow Mr Karim's argument any further. It seems to me that his argument involves taking too narrow a view of the expression "receipt by the applicant". The correct approach to the interpretation of a provision of the Immigration Rules was addressed by Lord Brown in *Mahad v Entry Clearance Officer* [20019] UKSC 16; [2010] 2 All ER 535 at [10] when he said this:

> "There is really no dispute about the proper approach to the construction of the Rules. As Lord Hoffmann said in *Odeola v Secretary of State for the Home Dept* [2009] UKHL 25 at [4], [2009] 3 All ER 1061 at [4], [2009] 1 WLR 1230:
>
> > "Like any other question of construction, this … depends upon the language of the rule, construed against the relevant background. That involves a consideration of the immigration rules as a whole and the function which they serve in the administration of immigration policy"
>
> … Essentially it comes to this. The Rules are not to be construed with all the strictness applicable to the construction of a statute or a statutory instrument but, instead, sensibly according to the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State's administrative policy."

21. Against the background of the administration of immigration policy, it seems to me in the highest degree unlikely that what the Secretary of State intended by the use of the words "receipt by the applicant" was actual, physical receipt into the applicant's possession. If that were the correct meaning to be given to the rule, the respondent would never know when the time for applying for administrative review had come to an end and the case could be regarded as closed. The tight, 14 day time limit for applying for administrative review, plainly an important feature of the scheme as a whole, would be effectively defeated. Further, the respondent would be met in countless cases with claims that properly posted decisions never reached the actual possession of the applicant.

22. For my part, I see no difficulty in reading "received by the applicant" in sub-paragraph (1) of Rule 34 as including not only actual, physical receipt, but also receipt at the applicant's correspondence address. Any other interpretation of the rule would

be completely unworkable. For what it is worth, that is obviously what the appellant (and his solicitors) understood by "*receipt by the applicant*" when they responded to the question "*When did you receive the Home Office letter*" with the date on which they considered it had been received at the correspondence address.

23. I also see no difficulty with adopting what may seem a relatively strict approach to the construction of the rule. In a case where an applicant contends that the application of the rule would work injustice he or she can seek to invoke the discretion under sub-paragraph (2).

24. It follows that the appellant received the February decision when it arrived at his correspondence address. Whether one takes the deemed date of receipt of 10 February, or the admitted date of 12 February, the application was out of time.

25. Mr Karim's second distinct element of this ground of appeal was that the respondent clearly had a discretion under rule 34R(2) as to whether to accept the application out of time. She had been expressly asked to exercise that discretion in the passage from the application which I have quoted in paragraph 9 above. He submits that it is plain from the March decision that the respondent did not consider whether she should exercise that discretion.

26. I have no doubt that the respondent has an obligation to consider the exercise of his discretion, at least when asked to do so, see e.g. *R (Behary and Ullah) v Secretary of State for the Home Department* [2016] EWCA Civ 702; [2016] 4 WLR 136 at [39] per Burnett LJ (as he then was):

> "There is an obligation to consider such [in that case a grant of leave to remain outside the Rules] when expressly asked to do so and, if but briefly, deal with any material relied on by an applicant in support"

27. It seems to me, however, that the respondent in the present case did consider the exercise of her discretion and dealt briefly with the material relied upon by the appellant in support. The only relevant material relied upon by the appellant was that the decision letter had been sent to his University where it had not come to his attention for some time, and that he had acted promptly by going to his solicitors as soon as it came to his attention. The respondent's reply was that, in sending the decision to the correspondence address provided by the appellant, she had done exactly as he had asked. That, to my mind, is her response to the request for the exercise of her discretion. I therefore cannot see how it can be suggested that she had not considered its exercise. Moreover, insofar as it is suggested that she has not dealt adequately with the material relied on, I consider that suggestion to be wrong as well. She dealt with it by saying that the letter had been sent to the University address at the express request of the appellant. Given that the discretion only arises where it is unjust not to waive the time limit, the respondent's response is, in my judgment, not arguably unlawful.

28. I would therefore reject ground 1 of the grounds of appeal.

Ground 2: the 5 year cap

29. There was some debate before us as to whether, once the attack on the March decision is rejected, it is open to the appellant to advance this ground at all. As I have indicated, his claim form did not identify the February decision as being under attack, and the respondent objected that an attack on the March decision was out of time and pointed out that there was no good reason to consider extending time. UTJ Frances did not deal with the February decision at all, and UTJ Craig only dealt with it on the footing that he was wrong about the attack on the March decision. The validity of the February decision only arose in the context of deciding whether there would be any purpose in quashing the March decision if it had been held unlawful. Consistently with all that, in refusing permission on the papers, Hamblen LJ said that it was necessary for the appellant to show a real prospect of success on both grounds in order to obtain permission to appeal to this court.

30. In my judgment, my decision on the first ground is fatal to the application for permission to apply for judicial review. Such applications must "*be made promptly*" and subject to an exception which does not apply here "*must be sent or delivered to the Upper Tribunal so that it is received no later than 3 months after the date of the decision … to which the application relates*" see Rule 28(2) Upper Tribunal (Procedure) Rules 2008. The application has not, up to this point, been treated as a direct challenge to the February decision, and it would not be right so to treat it for the first time on an appeal to this court.

31. I will nevertheless go on to consider this ground on the basis that it could be an alternative reason why the attack on the March decision could not succeed.

32. Paragraph 245ZX(ha) of the Immigration Rules provided at the relevant time:

> "To qualify for leave to remain as a Tier 4 (General) Student under this rule, an applicant must meet the requirements listed below. If the applicant meets these requirements, leave to remain will be granted. If the applicant does not meet these requirements, leave to remain will be refused.
>
> …
>
> (ha) 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."

33. The rules define "degree level study" as meaning:

> "a course which leads to a recognised United Kingdom degree at bachelor's level or above, or an equivalent qualification at level 6 or above of the revised National Qualifications Framework, or levels 9 or above of the Scottish Credit and Qualifications Framework".

34. Rule 245ZY is also relevant. It provided at the material time:

> "(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."

35. The table specifies that for a course of 12 months or more the periods of leave before the course starts and after the course ends are 1 month and 4 months respectively. For a course of 6 to 12 months the periods are 1 month and 2 months.

36. An initial question is how one calculates the relevant period. Does one count periods of leave to remain as a Tier 4 (General) Migrant (and if so what does one do when such periods overlap with each other or with a period of leave granted on a different basis)? Alternatively, does one count the periods during which the applicant was or will be "studying courses at degree level or above"? Or is it a hybrid or combination of these computations?

37. It is tolerably clear that, in her February decision, the respondent counted the periods of the courses at degree level or above. That is also the approach adopted by UTJ Craig. Our attention was also drawn to the respondent's guidance which was in use at the relevant time: "*Tier 4 of the Points Based System – Policy Guidance, Version 11/14*" expressed to be used for all Tier 4 application made on or after 6 November 2014 ("the Guidance"). At paragraph 109 the Guidance states:

> "In calculating the maximum amount of time that you spend studying at or above degree level, we will only include the length of the course and will not take into account periods of leave granted before or after your main course of study …"

38. Somewhat to my surprise, given the approach taken both in the February decision and the UT, Mr Malik, who appeared for the Secretary of State, advanced the argument that it was the periods of leave which had to be counted and not the periods of the courses. He accordingly included in his skeleton argument a calculation in which he included the whole of the period of LTR 1, and the whole of the period of LTR 2, and not just the periods of the courses (the ACCA course and the Sunderland course). This had the effect of including substantial periods after the courses ended, as well as double-counting the period of overlap between LTR 1 and LTR 2. On the other hand it excluded the period of LTR 1 before the ACCA course began.

39. Mr Malik relied for this approach principally on the decision of the UT in *Islam (Para 245X(ha); five years' study)* [2013] UKUT 608 (IAC). The appellant in that case entered the UK as a student in February 2005 with leave which was valid (when extended) to November 2009. The leave was granted for him to study for a BSc in computing for 4 academic years. His application was for leave for a further 3 academic years to undertake another degree level course, for a period from October 2012 to August 2015, taking him well above the 5 year limit on the basis of the length of his courses. The appellant had dropped out of the first course after two years, but

he conceded that this did not affect the calculation. The UT held that concession to have been correctly made. At [11] they said [11]:

> "The appellant had leave as a student for 4 years to pursue his degree course; that he chose to 'drop out' … does not deny the whole period of leave (excluding pre- and post-course leave 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 leave and not the actual study which is the measure for calculating the period spent in the UK imposed by para 245ZX(ha)."

40. I do not think this passage provides the support for Mr Malik's argument that he seeks to extract from it. If the applicant drops out, or chooses not to do part of the course, it will be right to take the period of the course for which he originally applied in his application for leave (as set out in the CAS) rather than hold an enquiry as to whether the applicant was in fact studying for the whole of that period. It is quite another thing to say that one takes the whole of the period of leave, including any pre- and post-course leave. In fact, by expressly excluding the periods of pre- and post-study leave under rule 245ZY(b), the UT was, in effect, holding that it was the period of the course during which the applicant had leave which counted.

41. Mr Malik also drew our attention to the fact that rule 245ZX(ha) was amended, after the date which is relevant for our purposes, to provide:

> "For the avoidance of doubt, the calculation of whether the applicant has exceeded the time limit will be based on what was previously granted by way of period of leave and level of course rather than (if different) periods and courses actually studied."

42. I do not see how a subsequent amendment can affect the interpretation of the earlier rule. In any event, this amendment seems to be dealing with the problem addressed in *Islam*, namely that it is not relevant to analyse what the applicant actually did in the way of study.

43. In my judgment, the enquiry required by the rule, in the form in which it stood at the date of the February decision, is to identify the total period during which two conditions are satisfied. The first condition is that the applicant is in the UK as a Tier 4 (General) Migrant (or Student). The second condition is that he should be studying (in the sense of within the duration of) the course at degree level identified on his CAS.

44. My reasons for reaching that conclusion are the following. First, before the course commences, it would not be apt to say that an applicant was "studying courses", just as it would not be apt to say so after the end date of the course. The rule does not employ language such as "in the UK as a Tier 4 (General) Migrant granted on the basis of an intention to study…". Instead it uses language which qualifies the period by reference to the courses. It is therefore necessary to exclude periods of leave outside the period of duration of the course, when the applicant could not be studying the course. Secondly, there are strong policy reasons for saying that during the

course, the applicant is to be treated as studying courses, even though he may be in a period of vacation between academic terms, or have dropped out. I agree with the UT in *Islam* that an approach which required enquiry into what the applicant had actually done during the course is unworkable and not what was intended by the rule. Thirdly, the respondent has to examine the application for further leave and ask whether the sum total of time spent exceeds the 5 year limit. In that prospective exercise the respondent will have nothing to work on beyond the stated duration of the course.

45. This approach has the advantage that one can take the relevant period from the CAS, which is required to state the course start date and course end date. It also has the advantage that it fits with the representations made by the respondent in the Guidance.

46. Mr Karim submitted that the studies actually undertaken at the Higher Education College Scotland by the appellant were not degree level study. His client never progressed beyond modules of the course which were below degree level and below SCQF level 9. I do not accept that this is the correct way to look at the matter. What matters is the course on which the appellant was enrolled. That was a course leading to a qualification which was above SCQF level 9. That approach is consistent with the definition of "degree level study", which is expressed as being a course which leads to a qualification at the specified level. It does not matter if elements within the course are themselves below degree level. It follows that the respondent was correct to take those studies into account in calculating the relevant time spent studying courses.

47. Mr Karim also relied on the decision of the UT in *Mirza (Pakistan) (ACCA Fundamental Level Qualification – not a recognised degree)* [2013] UKUT 41 (IAC). That decision was, however, concerned with a different paragraph of the Rules, which required the applicant to have been awarded a UK recognised Bachelor or postgraduate degree. The respondent in the present case need only show that the course on which the applicant was studying leads to such a degree "or an equivalent qualification" at the specified levels.

48. Applying the approach which I have indicated above, the period during which the applicant satisfied the first condition, that of being a Tier 4 (General) Migrant was from 22 December 2010 (the grant of LTR 1) to 20 February 2015 (the end of LTR 2). Within that period, the applicant was studying (as I have explained that term) the ACCA Course from 22 December 2010 to 30 October 2013. This is a period of 1044 days, slightly shorter than the 1088 days used by the UT, because the UT counted the period of the course before the applicant was granted LTR 1. Thereafter the applicant studied on the Sunderland course from 20 January 2014 to 20 November 2014, a period of 305 days, which is the figure taken by the UT. When added to the figure of 521 days for the Perth MBA course, the total is still in excess of 5 years.

49. It follows that the UT was right (subject only to a minor adjustment to the calculation) that the administrative review could not, even if made in time, have led to the respondent coming to a different conclusion.

Conclusion

50. For the reasons I have given, I would dismiss the appeal.

Lady Justice Nicola Davies:

51. I agree.