Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/05508/2013

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
on 7th November 2013	**On 11th November 2013**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

ANGELO SOLOMONS
(Anonymity order not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Dr Thorndike instructed by Arshed & Co Solicitors.
For the Respondent: Mr McVeety – Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Lloyd-Smith, promulgated on 3rd July 2013, in which she dismissed the Appellant's appeal against the refusal of the Secretary of State to vary his leave to permit him to remain in the United Kingdom as a Tier 4 (General) Student Migrant under the points -based system.

2. The appellant, a citizen of South Africa, was born on 25th May 1987.

3. The decision, dated 5th February 2013, refused the application by reference to paragraph 245 ZX (ha) of the Immigration Rules by reference to the fact that the sponsor with whom the Appellant wished to study was not a Recognised Body.

4. The refusal also contains a direction for the Appellant's removal from the United Kingdom pursuant to section 47 the Immigration Asylum and Nationality Act 2006.

Discussion

5. Dr Thorndike challenges the determination by reference to two issues, the first relating to the status of the institution. The Appellant provided a Confirmation of Acceptance of Studies (CAS) issued by Finance and Business Training Ltd who is a licensed and fully active sponsor. The fact the training provider is licensed and is a genuine organisation is not disputed and indeed in the refusal notice the Appellant was awarded the 30 points he claimed in respect of the CAS.

6. In the grounds seeking permission to appeal Dr Thorndike states that the training provider is a recognised institution but it is important to consider carefully the actual language of the Rules which state that it must be a 'Recognised Body' in a situation in which the provisions of subparagraph (ha) are applicable. A provider can be a recognised institution without being a Recognised Body as the definition of a Recognised Body is an institution which has been granted degree awarding powers by Royal Charter, Act of Parliament or the Privy Council. All UK universities and some higher education colleges are recognised bodies. Full details of those institutions can be found in The Education (Recognised Bodies) (England) Order 2010.

7. A letter from Finance Business Training has been provided, dated 16th September 2013, which confirms the organisation has been licensed by UKBA to sponsor students under Tier 4 as a Highly Trusted Sponsor. That may be the case but this is not confirmation that it has degree awarding powers.

8. The requirement for Finance and Business Training to satisfy this additional status issue arises from the Appellants immigration history. In paragraph 10 of the determination Judge Lloyd-Smith sets out the history as follows:

1st March 2004	Appellant arrives in the United Kingdom as a visitor.
9th October 2004	Appellant granted leave to remain as a student valid until 31st December 2005.
8th September 2005 - August 2006	Appellant studied for Bachelor of Business Administration.
8th September 2005 - September 2008	Bachelor of Business Administration
25th February 2008 - May 2009	Bachelor of Business Administration

13th July 2007–31st January 2010 MBA top-up in International Management

9. 245 ZX (ha) contains the following initial paragraph:

> " 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 five years in the UK as a Tier 4 (General) Migrant, or as a Student, studying courses at degree level or above unless :
>
> ……..

10. One of the conditions relates to the status of the sponsor as a Recognised Body.

11. The course for which the Appellant seeks the additional leave is an ACCA at NVQ level 7 which it was accepted is at degree level or above.

12. Dr Thorndike argued that the Appellant did not have leave to remain for a period of five years as a Tier 4 (General) Migrant, but the rule specifically states that it is either as a Tier 4 (Migrant) or Student. He argued in the alternative that any period of study was not continuous but the Rules do not require continuity of study for the five-year period. His final argument was that if one takes the periods of actual study the Appellant has only been undertaking educational courses for about three years seven months at the date of decision and not for a period of five years.

13. The three-year seven-month period was not accurately quantified but even if it was accepted as being accurate the Appellant will still fail. The reason for this is that the course in relation to which he seeks the variation is, according to the CAS, a course which started on 11th June 2012 and is due to finish on 10th December 2014, and is therefore of some two and a half years duration. The wording of the rule is very important because it is not a requirement that five years must have been completed by the date of application but that any period of previous study added to the period of study if granted leave to remain must not mean the Appellant spending more than five years in the UK as either a Tier 4 (General) Migrant or Student. Simple mathematics show that if the additional leave was granted this requirement will be breached.

14. It is therefore incumbent upon the Appellant to prove that the course provider is a Recognised Body or in receipt of public funding. This has not been proved and I therefore find that Judge Lloyd-Smith made no legal error when dismissing the appeal under the Immigration Rules for this reason.

15. Judge Lloyd-Smith also considered Article 8 and found the decision to be proportionate for the reasons set out in paragraph 12 of the determination. Dr Thorndike indicated at the hearing that he wished to raise Article 8 but this has not been challenged in the grounds seeking permission to appeal and he did not have permission to do so granted by the First-tier Tribunal. In any event, the findings in relation to Article 8 are within the range of those the Judge was

entitled to make on the evidence and no 'Robinson obvious' point arises. There is no legal error in the dismissal of the appeal under Article 8 ECHR for the reasons given.

16. I do however find that Judge Lloyd-Smith has made a legal error such that the determination must be set aside although the dismissal of the appeal under the Immigration Rules and Article 8 ECHR shall be preserved findings. The error arises out of the fact that the decision contains a combined rejection of the substantive application and a removal direction pursuant to section 47. The date of decision is 5th February 2013. Section 51 of the Crime and Courts Act 2013 substitutes a new sections 47 (1) and (1A) into the Nationality and Immigration Act 2006 from 8 May 2013 (Crime and Courts Act 2013 (Commencement no 1) Order (SI 2013/1042). The amendment to s.47 is not retrospective and only applies from 8th May 2013 after which a removal decisions made under s.47 will be lawful even if made before the applicant has notice of the variation decision. This means that notice of the two decisions can be given in the same document. The Judge should have found that the decision to remove was 'not in accordance with the law' - Adamally and Jaferi (section 47 removal decisions: Tribunal Procedures) [2012] UKUT 00414 (IAC) refers.

17. I allow the appeal to the limited extent it is remitted to the Secretary of State for a lawful removal decision to be made. The remaining findings of the Judge are to stand.

Decision

18. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is allowed to the limited extent set out above.**

Anonymity.

19. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order.

Signed…….
Upper Tribunal Judge Hanson

Dated the 8th November 2013