



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/06841/2013

THE IMMIGRATION ACTS

Heard at Field House
On 25 November 2013

Determination Promulgated
On 9 December 2013

Before

UPPER TRIBUNAL JUDGE ESHUN

Between

MR MEHMMUD UL HASSAN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Rehman, Solicitor
For the Respondent: Ms K Pal, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Bangladesh, born on 11 March 1977. He appeals with permission against the decision of First-tier Tribunal Judge Martins dismissing his appeal against the refusal of the respondent on 14 February 2013 to vary his leave to

remain in the UK as a Tier 4 (General) Student Migrant. The respondent's refusal was made under paragraph 245ZX(ha) of the Immigration Rules.

2. The refusal letter stated that the appellant had previously been granted leave to study a Postgraduate Diploma in Management Systems from February 2005 to February 2006, MSc in Information Systems from 14 February 2006 to 29 February 2008, MBA from October 2006 to July 2009, and MSc in Executive Leadership from 31 October 2011 to 3 October 2012. His current application is to study Diploma in Strategic Direction and Leadership from 14 November 2012 to 31 October 2014. A grant of leave to study this course would lead to the appellant 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. The appellant did not come within any of the exceptions as his course was not one of the courses listed in the Immigration Rules.
3. The judge heard evidence from the appellant. He confirmed that he was granted leave to remain in the UK on 10 December 2003 as a student until 31 January 2005. The judge recorded at paragraph 9(i) to (vii) the courses the appellant said he has studied in the UK. They are:
 - (i) Level 4 Diploma from London City Institute
 - (ii) Level 4 Diploma from (Jupitar) Information Technology from February 2005 to February 2006.
 - (iii) Level 3 certificate from Horizon College from February 2006 to September 2006.
 - (iv) Masters degree from London South Bank University from October 2006 to July 2008. From July to December 2008 the appellant was awaiting a decision/result of his dissertation, which he unfortunately failed in February 2008 and was asked to repeat his dissertation. From February 2009 to 14 June 2009 he restarted his studies and re-submitted the dissertation. He was finally awarded the qualification in September 2009.
 - (v) From 31 October 2009, the appellant applied for a post-study work visa and was granted such a visa until 31 October 2011.
 - (vi) From 31 October 2011 to June 2011 [sic 2012] he studied on a Masters degree from University of Ulster and was awarded a degree in October 2012, namely Masters of Science Certificate
 - (vii) In November 2012 the appellant enrolled on a Level 8 Diploma in Strategic Direction and Leadership from BITE College and attaches a copy of a letter from BITE.

4. In respect of the current course of study, the appellant said that formal organised study would be completed in December 2013, although the course would formally end in October 2014, as after December 2013 he is expected to work on his thesis. He said that this course is at doctoral level and is research based.
5. The appellant said that he had obtained a Bachelor's degree in Management in Pakistan. He produced a letter from Horizon College indicating that because of difficulties experienced by the college, the course in Information System was changed from MSc to a certificate qualification. He said that the Level 4 Diploma from London City Institute was not a postgraduate qualification.

6. The judge found as follows:

"28. I had the opportunity of hearing and observing the appellant give evidence and had no reason to disbelieve his account of the courses in which he had been involved in the United Kingdom. However, this appeal turns purely on whether the appellant has undertaken studies at a degree level or above, for more than the maximum of five years, permitted under the rules. Mr Rehman on behalf of the appellant sought to argue that as the appellant had been a post study worker from 31 October 2009 to 31 October 2011, the Home Office had made an error in calculating the five years, as there had been a break in his studies. Mr Rehman submitted that, carried to its logical conclusion, the decision would mean that no one could return to the United Kingdom for further study, having studied at degree level or above for five years. It was sought to argue that given the break in studies by the post study work visa, the appellant had not studied at degree level or above for five years.

29. I find that this would be importing the word "continuously" into the Immigration Rule. It is clear from the appellant's evidence, that before his current PhD equivalent course, he has studied at graduate level or above, for some five years between February 2005 and October 2012. His current studies, involves him in a further two years' study. I find therefore that the appellant has studied at graduate level or above for five years and that his current studies will lead to him exceeding that period. The decision of the Secretary of State is therefore in accordance with the law and Immigration Rules."

7. Permission to appeal was granted by First-tier Tribunal Judge Robertson who said as follows:

"2. It is arguable that the Judge, having stated that she accepted the Appellant's evidence as to the courses he had undertaken (paragraphs 16, 28 and 29), then made findings of fact as to the number of years that he was engaged in study at or above degree level that were inconsistent with his evidence. It is unclear from the determination which courses she

accepted as being at degree level or the periods during which the Appellant was engaged in degree level study.

3. There is less arguable merit in the other grounds: although the Judge has not made findings of fact in relation to the removal decision, this was not raised in submissions before her, which focussed entirely on the substantive decision. There is nothing with the provisions of paragraph 245ZX(ha) that excludes from the assessment of the five years period the studies undertaken by a Tier 4 (General) Student Migrant when he was a student under the previous paragraph 57 provisions. The provisions of paragraph 245ZX(ha) are clear that periods of leave to study as a Tier 4 (General) Student Migrant, or as a student, are to be included, and the definition of Student in the Immigration Rules does not affect these provisions. The logical outcome of the interpretation argued on behalf of the Appellant is that the current provisions will only apply if the Appellant has completed five years of degree or above degree level study **either** as a Tier 4 Student **or** as a student, which cannot be right as it would frustrate the clear aim of the Rules. As to the Article 8 assessment, it was conducted in accordance with **Razgar [2004] UKHL 27** principles, the Judge having accepted that Article 8 is engaged on the basis of the Appellant's private life; there is no need for the Judge to cite case law. She considered the Appellant's evidence with regard to private life and the proportionality exercise, albeit brief, appears to be adequate bearing in mind that the Appellant was not engaged in a course of study. However, pursuant to **Ferrer (limited appeal grounds; Alvi) [2012] UKUT 00304 (IAC)** all grounds are arguable."

SUBMISSIONS

8. Mr Rehman identified the courses that the appellant had undertaken at degree level or above by referring me to paragraph 9(iv) of the judge's decision where it is recorded that the appellant studied a Master's degree from London Southbank University from October 2006 to July 2008. He also relied on subparagraph (vi) where it is recorded that from 31 October 2011 to June 2012 he studied on a Master's degree from University of Ulster and was awarded a degree in October 2012, namely a Masters of Science certificate. Mr Rehman said that the appellant studied these courses over a period of three years. The appellant is currently undertaking a course in Strategic Direction and Leadership which is at doctoral level for a period of two years. This means that if permission is granted to the appellant to undertake this course his period of study at degree level and above would be up to five years.
9. Mr Rehman said that we have to disregard the period from December 2008 to February 2009 when the appellant was waiting for his results. We also have to disregard the period from February 2009 to June 2009 when he repeated the course and was awarded his degree in September 2009.

10. Mr Rehman maintained the argument that there are two different sets of student categories: the student under paragraph 57 of the old Immigration Rules and a Tier 4 (General) Student Migrant. He said that each student category comes with different conditions. Consequently, the appellant has either to satisfy 245ZX(ha) as a student under paragraph 57 or as Tier 4 (General) Student Migrant.
11. With regard to Article 8 he said that the appellant has been in the UK since December 2003 and has established friendships and connections in the UK. Most importantly, he is in the middle of his course and it is a course that is not available in Pakistan.
12. Mr Rehman, who had initially said that the appellant has been in the UK for almost ten years then argued that the appellant has now completed ten years in the UK and therefore meets paragraph 276 of the Immigration Rules. This is a new issue that arises after the date of decision and complies with Section 85(4) of the 2002 Immigration Act.
13. Ms Pal said that the appellant arrived in the UK on 10 December 2003 and has not been in the UK for ten years, and therefore the final argument by Mr Rehman does not assist the appellant. In any event, according to **Mansoor Ali [2013] EWCA Civ 1198** it is not permissible to regard a fresh ground of appeal as an application. Mr Rehman then said that the appellant has twenty days remaining before he is entitled to get the benefit of the ten year indefinite leave rule under paragraph 276. He submitted that paragraph 54 of **Patel [2012] EWCA Civ 741** distinguishes **Mansoor Ali**.
14. Ms Pal submitted that if the appellant is granted further leave to remain it would take him over the five year period stipulated under paragraph 245ZX(ha).

FINDINGS

15. I find that although the judge did not identify the courses she accepted as being at degree level, or the periods during which the appellant was engaged in degree level study, the decision was not tainted by error of law. I give my reasons below.
16. It is appropriate to set out paragraph 245ZX(ha). It states:

“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:”

It then goes on to give the exceptions which, as already noted, the appellant does not satisfy.

17. The respondent identified the courses for which the appellant was previously granted leave to study (1) Postgraduate Diploma in Management Studies from

February 2005 to February 2006; (2) MSc in Information Systems from 14 February 2006 to 29 February 2008; (3) MBA from October 2008 to July 2009; (4) MSc in Executive Leadership from 31 October 2011 to 3 October 2012. In light of this evidence I find that from 2005 until October 2012 the appellant had studied for five years on courses at degree level and above. Therefore, the respondent is right to say that if he is granted permission to remain to complete his current course of study that would certainly lead to the appellant 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.

18. I find that Mr. Rehman's arguments only focus on the courses the appellant claimed in his oral evidence that he studied. I find that some of the courses bear no relationship to the courses for which he was granted leave to study. For instance, he had been granted leave to study for a Postgraduate Diploma in Management studies from February 2005 to February 2006 but instead he studied level 4 Diploma from "Jupiter" Information Technology from February 2005 to February 2006. According to the respondent the appellant was granted leave from 14 February 2006 to 29 February 2008 to study for an MSc in Information Systems but from what he told the judge he studied for a level 3 Certificate from Horizon College from February 2006 to September 2006 before undertaking a Master's degree from London Southbank University from October 2006 to July 2008.
19. I find that paragraph 245ZX(ha) is based on the period of leave the appellant is granted to study at degree level and not on the duration of the courses he considers he has studied at degree level.
20. I do not agree with Mr Rehman's argument that there was a distinction between a Tier 4 (General) Student and a student because each category came with different conditions. Paragraph 245ZX was inserted into the Immigration Rules on 31 March 2009 and subparagraph (ha) was inserted from 6 April 2012. I do not find that the Immigration Rules make any distinction between courses studied as a student and courses studied as a Tier 4 (General) Student. I agree with First-tier Judge Robertson that there is nothing in the provisions of paragraph 245ZX(ha) that excludes from the assessment of the five year period the studies undertaken by a Tier 4 (General) Student Migrant when he was a student under the previous paragraph 57 provisions. This has been confirmed in a reported decision by the Upper Tribunal - **Islam (Para 245ZX(ha): five years' study) 2013 UKUT 00608(IAC)**.
21. I find on the evidence before me that the appellant does not satisfy the requirements in paragraph 245ZX(ha).
22. I also find that as the appellant has not been in the UK for ten years, he cannot qualify for leave to remain under paragraph 276B of the Immigration Rules and therefore Mr. Rehman's argument on this issue is not worthy of consideration. In any event I rely **Mansoor Ali [2013] EWCA Civ 1198** in which the Court of Appeal held that it is not permissible to regard a fresh ground of appeal as an application.

23. In respect of the appellant's appeal under Article 8 of the ECHR, the judge accepted that the appellant had been here for over nine years studying and therefore has established a private life which will be interfered with if he returns to Pakistan. She found however that the interference was in pursuance of the legitimate aim of effective immigration control. She considered the appellant's claim that if he had to leave the UK in the middle of his current studies, his career plans would be significantly impacted. She however found that the appellant has achieved much by way of qualification in the UK and that the interference that would ensue in his private life would not be disproportionate to the legitimate aim pursued. I see no error of law in the judge's findings.
24. I find that the judge did not make an error of law. The judge's decision dismissing the appellant's appeal shall stand.

Signed

Date 5th December 2013

Upper Tribunal Judge Eshun