



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

Appeal Number: IA/45217/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 26 November 2014**

**Determination
Promulgated
On 16 December 2014**

Before

**THE HONORABLE LORD BURNS
DESIGNATED JUDGE MURRAY**

Between

SAHATTHAYA SOPON

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Whitwell, Home Office Presenting Officer

For the Respondent: Mr Hussain, Counsel for A1 Law Chambers, London

DETERMINATION AND REASONS

1. The Appellant is a citizen of Thailand, born on 18 April 1987. She appealed against the decision of the Respondent dated 9 October 2013 refusing to grant her leave to remain in the United Kingdom as a Tier 4 (General) Student under Article 8 of ECHR. Her appeal was heard by Judge of the First Tier Tribunal D Ross and was dismissed in a determination promulgated on 13 June 2014.

2. An application for permission to appeal was lodged and permission was refused by First Tier Tribunal Judge Hollingworth on 30 July 2014 but permission was granted by Upper Tribunal Judge Pitt on 21 October 2014. She found that it is arguable that the First Tier Tribunal did not apply the correct test for calculating the amount of time spent by the Appellant studying at level 5, by failing to take into account that the calculation is not merely that of the amount of leave granted by the respondent. Permission was granted on this sole ground and permission was specifically not granted in relation to the Article 8 claim.
3. At the Hearing the Presenting Officer submitted guidance on the computation of the time permitted for studying, not at degree level.
4. At the outset of the hearing we referred to the issue of whether there was a right of appeal before the First Tier Tribunal. After discussion it was found that there might have been no right of appeal when the appeal was heard by the First-tier Tribunal but as the claim has reached the point which it has now reached, we went ahead with the error of law hearing.
5. The Appellant's representative submitted that the Judge made an error when he made his calculation of time. At paragraph 8 of the determination the Judge refers to paragraph 245ZX and the requirements for leave to remain as a Tier 4 (General) Student. One of these requirements is that if the course is below degree level, the grant of leave to remain the Applicant is seeking must not lead to the Applicant having spent more than three years in the United Kingdom as a Tier 4 Migrant since the age of 18, studying courses that do not consist of degree level study.
6. Counsel referred us to the last four lines of paragraph 9 of the determination and submitted that this is where the error lies. These lines state that the Judge believes that as the Appellant arrived in the United Kingdom on 27 October 2010, by March 2014 she will have spent more than three years in the UK studying courses that do not consist of degree level study. The judge stated that the requirements do not relate to the length of the actual courses but relate to the period which the Appellant has spent in the UK. Counsel submitted that as the judge found that the period in the UK is the significant period and not the length of the courses, he dismissed the appeal.
7. We were referred to paragraph 245ZY (b). This gives the calculations of time spent studying under degree level and paragraph 245ZY (iii) refers to the table at paragraph 245ZY(b). After discussion it was found that the Appellant has studied for two years and two months. This is accepted in the refusal letter. The Judge took the whole period of leave into his calculation instead of the actual study period of two years and two months. The appellant is entitled, based on this table, to study for another ten months at under degree level. Counsel submitted that the course the Appellant is now going to study is from 9 September 2013 until 4 September 2015 but only ten months of that period of study will be at

level 5 (below degree level) and the rest of the course will be at level 6 (degree level). He submitted that the Judge has made an error of law in his calculation and his decision should be overturned.

8. The Presenting Officer accepted that there is an error of law in the determination because of the calculation by the judge. He accepted that the Appellant has so far studied for two years and two months under degree level. He submitted that the Appellant then applied to study for a Diploma in Tourism and Hospitality Management from 9 September 2013 until 4 September 2015. He submitted that this is a points based system case and under paragraph 85A(iii) of the Rules, evidence that the new diploma course is partly at level 5 and partly at level 6 was not lodged with the application. He submitted that because of this the new evidence cannot be accepted. Originally the whole course was at level 5. He submitted that it is only now that there is evidence that the course is going to be studied at level 5 and then at level 6. He submitted that this evidence has only now become available and as this is new evidence it cannot be considered.
9. The Presenting Officer also accepted that there is an error of law in the time calculation in the determination at paragraph 9. The information submitted with the Appellant's application in respect of the new diploma course indicated that the length of the course at level 5 would be two years. The Appellant's overall studying at below degree level would therefore last for over three years. The Presenting Officer submitted however, that the misdirection is not material as the appeal cannot succeed because the evidence that the course is going to be split between level 5 and level 6 is new evidence which cannot be applied.
10. We asked Counsel if it is correct that the Appellant applied for the course to be upgraded. He said that is the case and this was not done before the application was made. He submitted that the course is now at level 6 after 2014 and the CAS submitted with the application is wrong.
11. Counsel submitted that the Judge made the wrong calculation at paragraph 9 and as the course has now been upgraded, the appeal should succeed. He submitted that fairness is an issue and points should be awarded to the Appellant and she should be granted leave to remain, as all the other terms of the Rules have been satisfied. He submitted that the Appellant had no control over the CAS letter and it was only because there was an error in the CAS letter that this application was dismissed. He submitted that this is only a technical point and because of the sponsor's mistake the Appellant has suffered. He submitted that when fairness is taken into account the application should succeed.

Determination

12. There is an error of law in the determination in that the Judge miscalculated the length of time that the Appellant would be studying under degree level. Both parties agree that the Appellant has so far

studied for two years and two months. In spite of this, the CAS handed in with the application stated that the diploma course the Appellant would be studying would be for two years and would be at level 5. In that case the Appellant would be studying in the United Kingdom for more than three years below degree level.

13. When the Appellant realised that her application was not going to succeed she asked for the course to be upgraded and the course was upgraded so that she would be studying first of all at level 5 and then the course would change to level 6.
14. This is a points based system case and the only evidence that can be considered is the evidence submitted with the application. In this case the CAS submitted with the application stated that the diploma course the Appellant will be studying will be for two years at level 5. The upgrading of the course only took place after the application had been refused at the request of the appellant. This is therefore new evidence and cannot be considered.
15. There is an error of law in the Judge's determination but it is not a material error of law as the appeal cannot succeed. For it to succeed the new evidence about her new diploma course would have had to be submitted with the application.

Decision

16. There is no material error of law in the Judge's determination although there is an error of law.
17. The First Tier Tribunal decision promulgated on 13 June 2014 must stand.

Signed

Date **16 December 2014**

Designated Judge Murray
Judge of the Upper Tribunal