Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/17595/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 October 2015	**On 25 November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

v

MR PRATHEEPAN NATRAJAN
(no anonymity order made)

Respondent

Representation:
For the Appellant: Mr J. Martin, counsel instructed by Nag Law solicitors
For the Respondent: Ms S. Vidyadharan, Home Office Presenting Officer

DECISION & REASONS

1. The Appellant is a national of Sri Lanka, born on 13th May 1977. He arrived in the United Kingdom on 4th January 2006, with entry clearance as a student valid to 2nd February 2007. His leave was then extended to 31st October 2010 and on 13th December 2010 he was granted further leave as a Tier 4 (General) student to 25th April 2011. On 4th April 2011, he was granted leave to remain as a Tier 1 (Post Study) Migrant. On 22nd March 2013, the Appellant applied for further leave to remain as Tier 4 (General) Student.

2. This application was refused on 8th May 2013 pursuant to paragraph

245ZX(ha) of the Immigration Rules on the basis that, if further leave were granted, the Appellant would have spent more than 5 years as a Tier 4 (General) Migrant or as a student and none of the exceptions applied. The Respondent's calculation was based on: (i) 17th September 2007 to 30 June 2010 when the Appellant was studying for a BSc Hons in Technology & Ecommerce (2 years, 9 months and 14 days); (ii) 22nd March 2010 to 25th February 2011 when the Appellant was studying for an MBA (11 months and 4 days). When added to the current proposed course of study of 2 years, 5 months and 2 days this amounted to a period of time in excess of 5 years.

3. The Appellant appealed and his appeal came before First Tier Tribunal Judge Bennett for hearing on 23rd May 2014. The Appellant was not present having suffered an accident as a result of which he was in hospital however a request for an adjournment was rejected and the appeal was dismissed. The Appellant sought and was granted permission to appeal to the Upper Tribunal and in a decision dated 22nd October 2014, Upper Tribunal Judge Perkins allowed his appeal to the extent of remitting it for a hearing before the First Tier Tribunal on the basis that it had been procedurally unfair to have refused to have adjourned on the basis that the Appellant's oral evidence would not have made any difference to the outcome of the appeal.

4. The appeal then came before First Tier Tribunal Judge Canavan for hearing on 1st December 2014. The Appellant attended and gave evidence. In a decision promulgated on 18th December 2014, she dismissed the appeal on the basis that she was satisfied that the periods of study the Appellant undertook towards the BSc Hons degree in IT and Ecommerce at BTTE and the BSc Hons degree in Business Management at MERC Education were "degree level study" for the purposes of paragraph 6 of the Immigration Rules and this amounted to 1 year and 4 months [18 refers]. The total period of degree level study amounted to 3 years and 1 month. Consequently, the proposed further grant of leave for 2 years, 5 months and 1 day would exceed 5 years, by 6 months and 1 day [19].

5. The Appellant sought permission to appeal on the basis *inter alia* that the Judge erred in her construction of "degree level study" at [18] of her decision as "degree level study" is at Level 6 or above and any study below Level 6 should not count towards the 5 year period and even if that is wrong, the second period of April 2008 to January 2009 was pre-sessional and did not lead to a degree, so should also not count towards the 5 year period.

6. Upon renewed application to the Upper Tribunal, permission to appeal was granted by Upper Tribunal Judge McGinty on 13th May 2015, on the basis that it was arguable that the Judge erred in law in finding that the pre-sessional studies carried out by the Appellant at MERC Education, prior to the commencement of the BA Hons in Business Administration, were study at degree level and should be counted for the purposes of paragraph 245ZX(ha) of the Immigration Rules.

7. In a rule 24 response dated 27th May 2015, the Respondent opposed the appeal on the basis that the Judge's conclusions were open to her.

Hearing

8. At the hearing before me, Mr Martin sought to expand on the grounds of appeal. He pointed out there was very little guidance in the policy and if either of the periods he says should not be counted i.e. the pre-sessional period of level 4 study which may have contributed from April 2008 to 2009, this would take the Appellant below the 5 year limit. The application the Appellant made in 2007 was to take a course which would have resulted in a BSc in Technology & Ecommerce. In his application form he indicated at 5.4. that it was level 4, as it was his understanding that the first year was at diploma level. There is no requirement to undertake each level and if he stopped at a level he would be entitled to that qualification. It is accepted that he did not even complete the first year, so the suggestion that any marks would have contributed to any finals result does not amount to a period that should have been considered as degree level or leading to a degree.

9. In respect of the second period ie. April 2008 to January 2009, this does not just rely on the Appellant's recollection or understanding of how the course worked. He had a letter from MERC education dated 6 January 2009, which was contemporaneous with his studies and that letter informed him the whole topic had been withdrawn because it had been offered in association with the University of Wales and that association had ended. In those circumstances his studies would not count towards a degree. Mr Martin submitted that at [18] the emphasis by Judge Canavan on paragraph 6 of the Rules is wrong in that, if her interpretation is correct, studies would count if the college states it leads to a degree, even if it may only be an English language course. The Respondent accepts levels 3, 4 & 5 do not lead to a degree. Mr Martin stated that he had not been able to find any jurisprudence on the point.

10. In response, Ms Vidyadharan submitted that it was pertinent that at [18] the Judge arrived at the conclusion that cumulatively the Appellant's studies amounted to a period of 3 years and 1 month and that it was "*common sense that a course of study described as a BSc Hons or BA Hons degree is "degree level study*." She handed up a copy of the decision in Islam [(para 245X(ha) five years study) [2013] UKUT 00608 and relied on [11] where the Upper Tribunal held *inter alia* that: *"The appellant had leave as a student for 4 years to pursue his degree course, that he chose to "drop out" (and not inform UKBA of that fact" does not deny that the whole of the period of leave (excluding pre and post-course leave granted under para 245 ZY(b) counts towards the maximum 5 year period and whatever he chooses to do in that period, he did it during a period of leave as a student. It is the period of the leave and not the actual study which is the measure for calculating the period spent in the UK imposed by para 245ZX(ha)."* Ms Vidyadharan submitted that the duration of courses was as the Judge has found according to the certificates and it was only the assertion by the Appellant that certain levels of study were not included; there was nothing in terms of objective evidence provided by the Universities to support that contention. There was no error of law and the Judge had been entitled to come to that conclusion.

11. In response, Mr Martin sought to distinguish the decision in Islam. He submitted that when that Appellant dropped out he did not undertake any study in the 2 year period and that there was a clear distinction between someone who has leave and has started a course and this case with the evidence from MERC. He accepted that in respect of the earlier period, it is simply the Appellant's word but in terms of the second period the college has confirmed the course was level 4 and so if this is not counted, the whole period is under 5 years. In respect of the Judge's reasoning at [18] he acknowledged that if one was at University that may be right but with these sorts of studies and colleges it is not all necessarily part and parcel of the same thing. Whilst the course was under the auspices of a degree course, each part is modular and separate. He invited me to re-make the decision.

Decision

12. I reserved my decision. Having had the opportunity to hear submissions from both parties and to consider further the decision of the Upper Tribunal in Islam (*op cit*) I find that First Tier Tribunal Judge Canavan erred materially in law in that her decision neither referred to nor took into account the decision of the Upper Tribunal in Islam as to the correct test to be applied.

13. I now proceed to decide the appeal. It is clear from the decision in Islam at [11] that it is the period of leave and not the actual study that is the measure for calculating the period of time spent in the United Kingdom imposed by paragraph 245ZX (ha). The fact that an Appellant may have dropped out is irrelevant as the whole period of leave still counts towards the 5 years, excluding the periods of pre and post study leave, as set out in paragraph 245ZY(b) of the Rules. In order to count towards the 5 years of degree level study, it follows that this must be leave granted in respect of degree level study. On the basis of this analysis, I calculate the Appellant's leave in respect of degree level study as follows:

(i) 4.1.06 to 2.2.07 i.e. 1 year, 4 weeks and 2 days**,** in order to study to study the final year of a BA Hons course in Business & Finance at Northumbria University (minus 5 months in accordance with paragraph 245ZY(b))= **8 months and 2 days**;

(ii) 4.3.08 to 31.10.10 i.e. 2 years, 8 months in order to continue with a BSc Hons course in IT and Ecommerce (minus 5 months as above = **2 years, 3 months**);

(iii) 13.12.10 to 25.4.11 i.e. 4 months, 1 week, 5 days in order to study for an MBA at the City of London College, but awarded by Birmingham City University (minus 14 days = **3 months, 28 days**)

14. The overall amount of time spent pursuant to leave in order to undertake degree level study or above, taking into account periods of pre and post study leave, as set out in paragraph 245ZY(b) of the Rules thus amounts to **3 years, 3 months**. The proposed extension of leave to study towards the ACCA qualifications (NQF Level 7) of 2 years, 5 months and 1 day would have taken

the Appellant over the 5 year time limit. Therefore, the question of whether or not the pre-sessional courses constitute degree level study or not does not matter for the purposes of this appeal, because it is clear on the basis of the leave already granted that the extension of leave applied for would have contravened paragraph 245ZX(ha) of the Rules. However, note (ii) to paragraph 245ZY provides that: *"A pre-sessional course is a course which prepares a student for the student's main course of study in the UK."* On this basis, it would appear that a pre-sessional course does not constitute degree level study and should be excluded from consideration of the 5 year period.

15. I note that the first two previous periods of leave for degree level study were as a student rather than as a Tier 4 (General) Student, however, the Upper Tribunal in Islam at [24] made clear, having heard argument on the point, that pre-Tier 4 leave is included rather than excluded from the calculation of the 5 years degree level study.

16. It follows that the Respondent was correct to refuse the application with regard to paragraph 245ZX(ha) of the Immigration Rules and I dismiss the appeal.

17. I note that whilst permission to appeal was sought in respect of Article 8 of the ECHR, permission was not granted on this basis and the matter was not pursued before me. It is remains open to the Appellant to make an application for leave to remain under the private life provisions of the Immigration Rules.

Deputy Upper Tribunal Judge Chapman

22nd November 2015