



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/44059/2014

THE IMMIGRATION ACTS

Heard at UT (IAC) Employment Tribunal
Birmingham
Prepared 14 September 2015

Decision & Reasons Promulgated
On 18 November 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

and

Appellant

LI TING ZHANG
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Miss R Petterson, Senior Presenting Officer
For the Respondent: Mr C Bircumshaw, Solicitor, Coventry Law Centre

DECISION AND REASONS

1. In this decision, the Appellant is referred to as the Secretary of State and the Respondent is referred to as the Claimant.
2. The Claimant, a national of the People's Republic of China, date of birth 25 February 1989, appealed against the Secretary of State's decision, dated 4 November 2014, to

refuse an application,, dated 9 September 2014, to remain as a Tier 4 (General) Student and to make removal directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.

3. The basis for the refusal of the Claimant's application was that with reference to paragraph 245ZX(ha) of the Immigration Rules she had spent more than five years in the UK as a Tier 4 (General) Student studying courses which consisted of degree level study.
4. Her appeal against that decision came before First-tier Tribunal Judge Hussain (the judge) who, on 13 February 2015, allowed the Claimant's appeal under paragraph 245ZX of the Immigration Rules on the re-calculation of the years of actual study in the UK.
5. The Secretary of State on 20 February 2015 applied for permission to appeal. On 13 April 2015, Designated First-tier Tribunal Judge MacDonald gave permission to appeal.
6. On one calculation of the period of course length by Claimant, she had spent studying at degree level at Leeds University from 21 September 2009 to 29 June 2012, c. two years ten months; and at the University of Bedfordshire from 1 October 2013 to 3 (?30) July 2014, ten months; making in total three years eight months. Accordingly the course she sought to undertake in Electrical and Electronic Engineering (MSc) commencing on 22 September 2014 (excluding later graduation) and completing that stage on 30 September 2015, effectively one year in length, meant that the Claimant would have a total period of actual study undertaken of c. four years and eight months i.e. under the five years limit.
7. On another calculation, it was said for the Claimant that she undertook study from 21 September 2009 at Leeds University a course of study, with an extension of leave, which should have finished on 1 July 2013, i.e. c.3 years 9 months 10 days. But the Director of Studies at Leeds University had terminated the Claimant's attendance

from 29 June 2012.i.e. after c.2 years 10 months. In this calculation the Claimant's period of actual study, including the ten months (1 October 2013 to 31 July 2014), was c. 3 years 10 months: Significantly less than the leave which had been granted to her. In the event, the further period of study undertaken by the Claimant at Coventry University began on 22 September 2014 and was to complete on 30 September 2015, a total of one year and eight days Thus the total period of actual study was 4 years 8 months 8 days. On the calculation advanced on behalf of the Claimant, the additional eight days makes no difference to the overall calculation of under five years of study.

8. Miss Petterson for the Secretary of State argued that the true calculation should include the total periods of leave granted rather than only the actual period of study undertaken. These were entry as a student on 13 September 2009 and the Claimant started at the University of Leeds 23 September 2009 to 1 July 2012, extended to 1 November 2013.c. 4 years 1 month 7days. The course at the University of Bedfordshire was 9 months 2 days (from 1 October 2013 to 3 July 2014). The Coventry University Course was from 22 September 2014 to 30 September 2015, (1year and 8 days). Mrs Petterson emphasised that with the cessation of studies from 29 June 2012 until the acceptance of study at the University of Bedfordshire on 1 October 2013, that the whole period of leave to study should be counted in.. Therefore, on any view, Mrs Pettersen argued the 4 years 1 month + 1 year 8 days was more than five years of leave to study in the United Kingdom however it came to be calculated.
9. So far as I can tell the Claimant was granted LTR as a T4 (General) student from 7 October 2013 to 30 September 2014.The period exceeded the period of actual study at the University of Bedfordshire. She further applied on 29 September2014 for further LTR as a T4 (General) student: The refusal of which was the subject of the appeal.
10. The judge in considering the matter accepted a calculation which excluded the months of study lost between 29 June 2012 and1 October 2013; the commencement of the Claimant's further studies.

11. The provisions of paragraph 245ZX(ha) of the immigration rules are that:

“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 ...”

12. There are various qualifications to that paragraph which are not directly pertinent. The Secretary of State relied upon the case of Islam (Paragraph 245(ha) five years' study) Bangladesh [2013] UKUT 608 (IAC). It is clear that the wording of paragraph 245(ha) was essentially the same to the later wording of paragraph 245ZX.

13. The analysis of the Vice President, Mr Ockelton, and Upper Tribunal Judge Grubb, who drafted the decision of the Upper Tribunal, reached the view on the wording of the rules that it is the period of leave granted not the actual study undertaken which was the measure for calculating the period spent in the UK imposed by paragraph 245ZX(ha). The reasoning of the Tribunal was clearly along the lines that the wording of the Rule was unequivocal and thus all the time in respect of which leave was granted was to be counted in working out the total period of five years as a student in the UK.

14. There has been no relevant change to the Rules in their format from then to now in this respect, but, what had happened since that time was that in July 2014 the Secretary of State published policy guidance, which in part addressed the Islam point, to inform as to how she intended to apply the immigration rules, with reference to paragraph 245ZX Tier 4 (General) Student Migrant Guidance, stated at paragraph 109:

“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 the additional periods of leave granted before or after your main course of study that are referred to in the table at paragraph 98.”

15. It was common ground that there was no table at paragraph 98 and no-one identified, anywhere else in the PBS provisions within the immigration rules that a paragraph 98 existed or one which assisted in calculating time spent in study
16. Therefore at the date of the Respondent’s decision an Applicant such as the Claimant, being aware of the rules and then aware of the guidance, would have been left in the position that there appeared to be a contradiction over how the Secretary of State intended to apply the rules in calculating the five year period: Particularly in relation to the time before the course started or after the course was completed. The Secretary of State did not refer to the guidance in her decision on the Claimant’s application.
17. The guidance in this form can only have been directed to calculation of the permitted length of study. It seemed to me that the Secretary of State’s construction of paragraph 245ZX in practice limited the period of leave to study to more than five years as a student. However, I take ‘the period of study’ in the Guidance to mean the period which covered the course applied for; whatever its outcome might ultimately be if not completed. I am therefore satisfied that the calculation of the period of study did not stop running on 29 June 2012 to be reset when a further course was applied for: Rather the study period reflected the expectation of the course being completed in the given time; absent of any additional extensions being granted as a matter of discretion by the Secretary of State. I do not know what, if any, period of time in the extension to 1 November 2013 was to cover a period after the completion of the course e.g. to await results of finals/ exams.
18. Therefore, I am satisfied that the judge made a material error of law. I find the Claimant by undertaking the further course of study at Coventry University for a year and 8 days was in fact and had applied to undertake a course which took her over the five years of actual study. Mrs Pettersen had calculated (5 years 1 month

and 15 days. The outcome is the same or similar because the periods of actual study and the periods of leave exceed the 5 year limit.

19. Mr Bircumshaw drew my attention to a material differences, as he put it, between paragraphs 245ZX(ha) and (hb). The latter states if the Applicant has completed a course leading to the award of a PhD in the UK, the grant of leave to remain the Applicant is seeking must not lead to the Applicant having spent more than eight years in the UK as a Tier 4 (General) Migrant, or as a student.
20. I agree that the wording is not exactly the same and that may reflect the fact of the complexities of timing the completion of a PhD and a greater latitude to enable someone to do so. It is not ultimately for me to recast the Rules. I apply them as it seems clear to me it was intended they should be read, as qualified by the Secretary of State's guidance to Applicants as to how she would calculate a period of study.
21. In the circumstances of the case, given the time that the Applicant has actually been given leave to undertake courses in the UK, it seemed to me that this was not a case where the matter needed to be considered again by the Secretary of State with reference to her published guidance which still stands. As a fact the position was the previous periods of studies, and that of the additional course, the basis of the appeal, took the period of time in the UK over the five years contemplated by paragraph 245ZX(ha) of the Immigration Rules in respect of both the length of permitted stay and periods of study.
22. The Original Tribunal, therefore, made an error of law and the decision cannot stand.
23. In the light of the judge's findings, the submissions and the periods of study given to me in submissions made, it is clear to me that the Claimant could not comply with the provision of paragraph 245ZX(ha) of the immigration rules. In those circumstances, there being no other material arguments which relate to the calculation of that period, I am satisfied that the appeal of the Claimant fails.

Notice of Decision

24. The Original Tribunal's decision cannot stand. The following decision is substituted.

25. The Claimant's appeal under the Immigration Rules is dismissed. The appeal of the Claimant against removal directions is dismissed.

Anonymity

26. No anonymity order was imposed nor is one required or necessary.

Signed

Date 13 November 2015

Deputy Upper Tribunal Judge Davey