



Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/20997/2014

THE IMMIGRATION ACTS

Heard at Field House
On 1 March 2016

Decision & Reasons Promulgated
On 18 March 2016

Before

Deputy Upper Tribunal Judge Pickup
Between

Thanuja Darshaka Withanayake Mudiyansele
[No anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Mr H Kannangara, instructed by Law Direct Immigration Advisers
For the respondent: Mr P Nath, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of First-tier Tribunal Judge Charlton-Brown promulgated 18.2.15, dismissing his appeal against the decision of the Secretary of State, dated 24.4.14, to refuse his application made on 10.3.14 for leave to remain as a Tier 4 student, and to remove him from the UK pursuant to section 47 of the Immigration Asylum and Nationality Act 2006. The Judge heard the appeal on 26.1.15.

2. First-tier Tribunal Judge De Haney refused permission to appeal on 24.4.15. When the application was renewed to the Upper Tribunal, Upper Tribunal Judge Smith also refused permission to appeal on 3.7.15. However, an application for Judicial Review was granted, quashing the refusal of permission. In consequence the Vice President granted permission to appeal on 11.12.15
3. Thus the matter came before me on 1.3.16 as an appeal in the Upper Tribunal.

Error of Law

4. For the reasons set out below, I find that there was an error of law in the making of the decision of the First-tier Tribunal such that the decision of Judge Charlton-Brown should be set aside and remade by allowing the appeal.
5. The relevant background can be briefly summarised as follows. The appellant first came to the UK in December 2010 with leave as a student. His leave was subsequently extended in 2013 for further study, with leave to expiry 27.7.15. However, the sponsor licence of his college, the 'Academy De London', was revoked on 4.11.13 and the appellant made no new application. On 9.1.14 his leave was curtailed to expire 10.3.14, advising him he should either leave the UK or make a new application before the expiry date. He made his new application on 10.3.14, but it was refused on 24.4.14, giving rise to the appeal to the First-tier Tribunal.
6. This case involves an interesting point of construction of the wording of paragraph 245ZX(h):

“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 3 years in the UK as a Tier 4 Migrant since the age of 18 studying courses that did not consist of degree level study.”
7. The reasons for refusal letter states that he had previously been granted leave to study below degree level courses for two years and six months. His new application was to study for a NQF Level 5 Extended Diploma in Management until 16.1.15, a below degree level course. The refusal decision stated, “A grant of leave to study this course would result in you having spent more than 3 years in the UK as a Tier 4 (General) Student studying courses that do not consist of degree level study, therefore you fail to meet the requirements of paragraph 245ZX(h) of the Immigration Rules.”
8. The Secretary of State's case is that adopted by the First-tier Tribunal Judge, that paragraph 245ZX(h) is to be construed as meaning that an applicant must not be in the UK for longer than the three-year period as a student of courses below degree level. Since he was initially given leave for two years and 6 months, the further period of study applied for would, on this interpretation, mean that he would be in the UK for longer than 3 years. In fact, the Rule 24 response, dated 29.1.16 goes further by asserting that as he came to the UK in December 2010 and, according to the evidence recorded by the First-tier Tribunal at §13, stopped studying in August

2014, he was already over the 3 year period before making the application the subject of this appeal.

9. The appellant's case at the First-tier Tribunal was that his first grant of leave in November 2010 was for a course of two years' duration (24 months), as confirmed by the CAS letter dated 3.11.10. He had not started studied at the second college before its licence was revoked. His last application was for a one-year course, which would bring his total period of study in the UK to 3 years.
10. Judicial Review was granted on the basis that there is arguable merit that the construction of the wording of paragraph 245ZX(h) should not be that adopted by the First-tier Tribunal Judge, but that as the restriction is qualified by the word 'studying,' it renders the three-year limit as one of three years of studying rather than three years presence in the UK.
11. In his submissions Mr Kannangara's pointed to the Tier 4 Policy Guidance version 08/2014, which at §109 states that, "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." This table sets out how long a Tier 4 student can come to the UK for, depending on the type of course and the length of the course. However, in respect of each alternative, the length of stay allowed is the full length of the course plus an additional period after the end of the course.
12. Whilst §109 refers to "at or above degree level," which the appellant's course level was not, the table refers to courses that are necessarily shorter than degree-level course, including less than 6 months. This is entirely consistent with a construction of paragraph 245ZX(h) to mean period of time in the UK studying, as opposed to period of leave to be in the UK as a study. Although the appellant's first course was of 24 months, he was granted 2 years and 6 months leave, again consistent with the appellant's submission that leave to be present in the UK for the purpose of studying is not the same thing as actually studying on the course. Otherwise, even though his first course was 24 months, he would be prevented from studying up to the maximum period of 3 years, just because his initial leave was granted for longer than 2 years. The strict interpretation contended for by the Secretary of State is contrary to common sense and inconsistent with her policy guidance to disregard the additional periods of leave when calculating the maximum amount of time spent studying in the UK.
13. In the circumstances, I find that the interpretation adopted by the First-tier Tribunal was incorrect and thus that the decision was in error of law. In light of this conclusion, it must follow that the appeal should be allowed on immigration grounds.

Conclusions:

14. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I re-make the decision in the appeal by allowing it on immigration grounds.



Signed

Deputy Upper Tribunal Judge Pickup

Dated 15 February 2017

Deputy Upper Tribunal Judge Pickup

Consequential Directions

15. Forthwith on receipt of this decision the respondent shall grant the appellant leave to remain for such period as is necessary to give effect to this determination.

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order.

Given the circumstances, I make no anonymity order.

Fee Award Note: this is not part of the determination.

In the light of my decision, I have considered whether to make a fee award.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make a whole fee award.

Reasons: The appeal has been allowed.

A handwritten signature in black ink, appearing to read "James". The signature is written in a cursive style with a large initial 'J' and a long horizontal stroke.

Signed

Deputy Upper Tribunal Judge Pickup

Dated

15 February 2017