Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33639/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 21st May 2014	**On 10th June 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE J G MACDONALD

Between

MR MOHAMED AMEER MOHAMED MUMTHAJ

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Solomon, Counsel, instructed by Jein, Solicitors
For the Respondent: Mr P Duffy, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of Sri Lanka who on 30th April 2013 made an application for further leave to remain here as a Tier 4 (General) Student under the points-based system. He had previously been granted leave to remain in the capacity of a Tier 4 Student on several occasions having first entered the UK on 27th September 2005.

2. The Appellant appealed against the refusal under the Immigration Rules and as noted by First-tier Tribunal Judge Wilsher his application was refused in a decision dated 22nd July 2013. The Grounds of Refusal were described by the Judge as extremely narrow in that the Respondent said the Appellant had failed to satisfy paragraph 245ZX (ha) which requires that a person not be granted leave to remain where this would result in having spent more than five years in the UK as a Tier 4 (General) Migrant unless "(i) *the applicant has successfully completed a course at degree level in the UK of a minimum duration of four academic years".*

3. For a number of reasons Judge Wilsher dismissed the appeal. Firstly, at the date of application the Appellant had not successfully completed a course at degree level. Secondly, the course that he took was a three year course; the fact that he was taking a bridging course at the same institution for one year to enter their degree programme was not relevant. Finally the Judge concluded that he only had restricted jurisdiction to consider new evidence and the Appellant had not filed the degree certificate with his application because it did not exist at that time. The Tribunal therefore had no jurisdiction to consider this evidence which came into existence after the application was lodged.

4. Grounds of application were lodged on a number of grounds. Firstly, it was said that the Rules did not require the successful completion of the course "at the date of application" and the judge had ignored the continuing nature of the application per **AS (Afghanistan) v SSHD [2009] EWCA Civ 1076** and other cases.

5. Furthermore the judge was wrong to hold that the fact that it may have taken the Appellant more than three years to finish the course was irrelevant. This was undoubtedly material in assessing the actual duration of the course. The judge was wrong to hold the BA bridging course was irrelevant as it was undoubtedly material given that it was a preparatory course required to be admitted onto the third year of BA in business studies programme and as such was part of his studies at degree level. In the alternative, inadequate account was taken of his studies at the London School of Commerce where he had studied an advanced diploma validated by the University of Wales as part of the BA in business studies course.

6. The judge had reasoned against the Appellant on the basis that he could not take account of the degree certificate by the virtue of Section 85A of the 2002 Act because it was not submitted with his application and came into existence after the initial date of application. In so reasoning the judge made a material misdirection of law. Section 85A (4)(d) allowed the Tribunal to consider evidence adduced by the Appellant if it was adduced in connection with the Secretary of State's reliance on a discretion under the Rules. Paragraph 245ZX(ha) did not relate to the acquisition of points and Section 85A did not preclude the Tribunal from considering evidence submitted by the Appellant after the date of application but before the date of decision (see **Nasim & Others (Raju: reasons not to follow? Pakistan) [2013] UKUT 610 (IAC)**).

7. Permission to appeal was initially refused but granted by Upper Tribunal Judge Goldstein on the basis that the First-tier Tribunal may have failed to give adequate reasons for its findings.

8. Thus the matter came before me on the above date. Before me Mr Solomon relied on his grounds. As stated there the judge was wrong to say that he could not take the degree certificate into account. Reference was made to head note number 4 in **Nasim** (above) in that Section 85A did not prevent a Tribunal from considering evidence that was before the Secretary of State when she took the decision, whether or not that evidence reached her only after the date of application for the purposes of paragraph 34F of the Immigration Rules.

9. In terms of the second ground the actual duration of the course was important and the matter must be looked at holistically. If the Rule was intended to exclude a break in the degree course then the Rules would have said so. I was referred to paragraph 6 of the Immigration Rules and the interpretation of "degree level study" which was said to mean a course which leads to a recognised United Kingdom degree at bachelor's level. The important words were "which leads" and were not "that is" and the Appellant therefore came within the Rules as he had not gone beyond the six year limit. I was therefore asked to conclude that there was a material error of law, to set the decision aside and allow the appeal.

10. For the Home Office it was said that the judge was quite correct to find that the Appellant had not successfully completed a course at degree level of four academic years. It was not the case that two separate courses could constitute a degree. As such the judge was correct in his analysis.

11. The Appellant had been studying here since 8th September 2005. He had been here for some eight years already. If any extension was going to be granted it would put him past the six year entitlement set out in paragraph 245ZX (ha) (i) in that a grant of leave must not lead to the applicant having spent more than six years in the UK.

12. It was said that the Secretary of State did have a policy of looking at evidence which postdated the application but which preceded the date of decision – as set out in **Nasim**.

13. However any error in law by the judge was not material and the decision should be upheld.

14. I reserved my decision.

Conclusions

15. The background to this appeal is that, as stated by the judge in paragraph 5 of the determination, the Appellant began his studies at the London School of Commerce in October 2006. This was an advanced diploma in business management which was a two year course. The Appellant maintains he did not like the teaching quality at that college and he

transferred to the Kensington College of Business in the period 2009-2010 and undertook what is described as a "BA bridging" course. This was a preparatory course that was required by Kensington College in order for a student to be admitted onto the third year of their BA in business studies programme. Having completed the bridging course he took two more years between 2011 and 2013 at the Kensington College to complete the third year of the BA (honours) in business studies validated by the University of Wales. As the judge put it the refusal was a narrow one and is on the basis that he has not successfully completed a course at degree level in the UK of a minimum duration of four years.

16. Paragraph 245ZX of the rules sets out the requirements for leave to remain as a Tier 4 (General) Student. As is said there if an applicant meets the rules he will be allowed leave to remain and if he does not then the applicant will be refused. Parties were at one in viewing the outcome of this appeal as depending on the interpretation of what is meant under paragraph 245ZX(ha) (i) when it is said that the applicant requires to have "*successfully completed a course at degree level in the UK of a minimum duration of four academic years".*

17. However, before he reached that point, the judge dismissed the appeal on the basis that a degree certificate with his application was not lodged (it was not available) as at the date of application.

18. Mr Solomon relied on the head note (4) of **Nasim** on the basis that evidence could be considered that postdated the application – the judge having found that he could not do so. Mr Duffy agreed with this proposition but it must be said that paragraph 34F mentioned in **Nasim** relates to a **variation** of leave to remain which is a different scenario and not the position before the judge.

19. Mr Solomon relied on a number of cases mentioned in the grounds of appeal including **AS** (above) but as noted in **Raju and others v SSHD [2013] EWCA Civ 754** paragraph 34G precludes the concept of a continuing application which starts when it is first submitted and concludes at the date of decision, either of the Secretary of State, or, on appeal, of a Tribunal (paragraph 17). An application is made when paragraph 34G says it is made (paragraph 24). When the judge said in paragraph 6 that the Tribunal had no jurisdiction to consider this evidence (the degree) which came into existence after the application was lodged the judge was following existing jurisprudence by which he was bound – as noted in head note (1) of **Nasim** it is *not legally possible* for the Tribunal to decline to follow the judgment in **Raju**.

20. It seems to me that what the judge was doing was linking the lack of a degree certificate to the reasons for refusal given by the Secretary of State. Absent the degree certificate the judge was not satisfied that the Appellant had successfully completed the course at degree level. There is no error in law in such an approach and indeed it is difficult to see how the

judge could have found otherwise. As such, and for this reason alone, the judge was correct to dismiss the appeal.

21. Furthermore it seems to me that the judge was correct to say that the course he took "quite clearly" was a three year course. It cannot therefore reasonably be said that he had successfully completed a course at degree level of a "minimum duration of four academic years" – to have found otherwise would have not sat easily with the natural interpretation of those words. When the judge said that the bridging course for one year was not relevant he was explaining that this did not transform the Appellant's studies into a four year degree course which was what the Appellant had to show to succeed under the rules; his failure to demonstrate this was the basis of the refusal. Even looking at the matter holistically as suggested by Mr Solomon it cannot reasonably be said that the Appellant was engaged in a course at degree level of a minimum duration of four academic years. As such it does not come within the exception permitted under paragraph 245ZX (ha) (i).

22. It follows that there was no error in the judge's approach or in his decision which must stand.

Decision

23. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

24. I do not set aside the decision.

Signed Date

Deputy Upper Tribunal Judge J G Macdonald