Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/50229/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 15th July 2014	**On 28th July 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE J G MACDONALD

Between

MR MALIK KASHIF ALI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr V Makol, Legal Representative
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a citizen of Pakistan who applied for leave to remain as a Tier 4 (General) Student Migrant. His appeal was allowed under the Immigration Rules by First-tier Tribunal Judge Rose in a determination promulgated on 29th April 2014. Grounds of application were lodged. It

was noted that the Respondent had refused the application on the basis that the Respondent was not satisfied that the Appellant met the requirement in paragraph 245ZX(h), namely 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 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."

2. The grounds stated that the judge had simplified the Appellant's period of study as a "one year course" and a "two year course". The course dates recorded in the CAS which are set by the sponsoring institution was that the proposed course was two years and four days. There was no "near-miss" principle that said that failing by a few days was anything other than an irrelevant consideration.

3. As such the judge should have found that the Appellant had not satisfied the Rules and gone on to dismiss the appeal.

4. Permission to appeal was granted by First-tier Tribunal Judge Fisher who noted that the judge accepted the Appellant's unchallenged oral evidence that he actually registered for the first course on 31st May 2012 and started it on 4th June 2013. However it was arguable that the judge had erred in law by departing from the dates referred to in the respective CAS documents. Accordingly, permission to appeal was granted.

5. Thus the appeal came before me on the above date.

6. Mr Tufan for the Home Office stated that he was relying on his grounds. What was important was the period of grant of leave as confirmed by the case of Islam (paragraph 245X(ha): five years' study) [2013] UKUT 00608 (IAC).

7. For the Appellant Mr Makol said that it was accepted that the second course did have a duration of two years and four days. As such the judge had been wrong to hold otherwise but he had been correct to allow the appeal because the Appellant had given unchallenged evidence that he had registered for the course on 31st May 2012 and he started it on 4th June 2012. It was the period of study that mattered and not the actual grant of leave. It was impractical for there to be any other way to look at such a case because the grant of leave was always bound to be longer than the actual period of study. I was asked to conclude there was no error in law and to therefore uphold the Appellant's appeal.

8. I reserved my decision.

Conclusions

9. The judge found, notwithstanding the precise start and end dates recorded in the Appellant's CAS details that the course was "properly to be regarded" for the purposes of sub-paragraph 245ZX (h) as a two year

course. It was on that basis that he went on to allow the appeal. Mr Makol accepted that the judge had been wrong to allow the appeal on this basis and it is clear enough that the judge erred in law in doing so.

10. Mr Makol was quite clear in his submission that it was not the grant or period of leave that was in issue, rather it was the actual time spent on the course by the Appellant that had to be taken into account. Mr Makol indicated that it was almost inevitable that the Appellant's grant of leave would be for a longer period than the actual time spent on the duration of the course. He did not argue that there was a near-miss principle and did not seek to invoke Article 8 ECHR because such an argument would not have assisted him. In any event no Rule 24 notice was lodged. As Mr Makol accepted his argument goes against the terms of the Immigration Rules which refer to the "grant of leave" to remain that must not lead to an applicant having spent more than three years in the UK as a Tier 4 Migrant.

11. The case of Islam referred to above, a decision of the Vice-President, indicated that 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 paragraph 245ZX(ha) –paragraph 11.

12. It was not disputed before me that the Appellant's grant of leave to study at CECOS London College was from 28th May 2012 until 28th May 2013. Nor was it disputed that his grant for Stanfords College UK Limited was from 26th September 2013 until 30th September 2015 (two years, four days). Given what is said in the Immigration Rules it therefore seems to me that it does not avail the Appellant to say that he only started studying on 4th June 2012. As Mr Makol put it, that was his unchallenged evidence and there is no reason to doubt it. However the fact that the Appellant did start his course a few days after 28th May 2012 does not affect the granting of leave for precisely the one year period.

13. Mr Makol accepted that the Immigration Rules were against him. There is no near-miss principle and I have no discretion to go outwith the Rules. It cannot be said that the rules are unfair on the Appellant.

14. It is clear that the judge erred in his reasoning and, as it transpires, also in the outcome of the appeal. It was an error in law to find that the course of two years four days was effectively a two year course. It was an error in law not to apply the terms of the Immigration Rules.

15. It is therefore necessary to set this decision aside and substitute a fresh decision dismissing the appeal.

Decision

16. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

17. I set aside the decision.

18. I re-make the decision in the appeal by dismissing it.

Signed Date

Deputy Upper Tribunal Judge J G Macdonald