Upper Tribunal
(Immigration and Asylum Chamber)

Islam (Para 245X(ha): five years' study) [2013] UKUT 00608 (IAC)

THE IMMIGRATION ACTS

Heard at Columbus House, Newport **Determination Promulgated**

On 24 July 2013

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Before

MR C M G OCKELTON, VICE PRESIDENT

UPPER TRIBUNAL JUDGE GRUBB

Between

MOHAMMAD FOYZUL ISLAM

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr T Ahmed of Universal Solicitors

For the Respondent: Ms E Martin, Senior Home Office Presenting Officer

Paragraph 245X(ha) of HC 395 must be read as requiring the calculation of the five years spent in the UK as a Tier 4 (General) Migrant or as a student studying at degree level or above to include time spent as a student before the introduction of Tier 4. Nothing in relevant Guidance permits a contrary result.

DETERMINATION AND REASONS

1.
The appellant is a citizen of Bangladesh who was born on 6 July 1980. He arrived in the United Kingdom on 10 February 2005 with a student visa valid until 6 August 2005. Subsequently he was granted further leave as a student until 30 November 2009. Thereafter, he was granted leave as a Tier 4 (General) Student initially until 7 November 2011 and thereafter until 29 August 2012. On 29 August 2012, he applied for further leave as a Tier 4 (General) Student in order to undertake a Chartered Institute of Management Accounts (CIMA) course at NQF level 7 at the Lea Valley College. The course was due to start on 8 October 2012 and its expected end date is 31 August 2015.

2.
On 5 November 2012, the Secretary of State refused the appellant's application under para 245ZX of the Immigration Rules (Statement of Changes in Immigration Rules, HC 395 as amended). Given that the appellant had first been granted leave to enter as a student on 10 February 2005, the Secretary of State was not satisfied that the appellant met the requirement in para 245ZX(ha), namely that:

"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 ..."

3.
The Secretary of State concluded that the appellant had studied at degree level for his BSc in Computing for 4 years. If granted leave to study a Master's course at a non-Recognised Body or Higher Education Institution for a further 3 years, he would exceed the maximum 5 years study at degree level or above permitted by para 245ZX(ha).

4.
The appellant appealed to the First-tier Tribunal. In a determination dated 24 January 2013, Judge Knowles dismissed the appellant's appeal. The judge found that the appellant could not meet the requirements of para 245ZX; the respondent's decision was consistent with the relevant Tier 4 Guidance; there was nothing unfair in the respondent's decision; and no breach of Art 8 was established.

5.
On 19 February 2013, the First-tier Tribunal (Judge Bailey) granted the appellant permission to appeal. Thus, the appeal came before us.

6.
The judge made a number of findings in relation to that history which are not challenged before us.

7.
The appellant first entered the UK as a student on 10 February 2005. His leave was valid until 5 August 2005 but was extended until 30 November 2009. The basis upon which he entered the UK was to undertake study for a BSc course in computing at the University of the West of England. That course began in September 2005. His leave was extended until 30 November 2009 – the equivalent of four academic years – in order to complete that course. In fact, the appellant 'dropped out' of the BSc course after two years. It appears that the appellant did not study again for some two years. However, in 2007 he enrolled at the City of Bath College to undertake a foundation degree course. That course, unlike his BSc degree that he had not completed, fell below study at "degree level" at NQF level 5 (see para 6 of the Rules). His leave to study that course was extended to 7 November 2011 as a Tier 4 Student and again, on that basis until 29 August 2012. The judge accepted that the appellant had taken three years to complete the two year foundation course and that he was awarded a foundation degree in Applied Computing in October 2012. The appellant's current application for leave is in order to undertake a CIMA course at NQF level 7 (and therefore at or above degree level study) from 8 October 2012 until 31 August 2015.

8.
The relevant Immigration Rule is para 245ZX(ha) which provides as follows:

“To qualify for leave to remain as a Tier 4 (General) Student under this rule, an applicant must meet the requirements listed below. If the applicant meets these requirements, leave to remain will be granted. If the applicant does not meet these requirements, the applicant will be refused.

Requirements:

….

(ha) 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:

(i) the applicant has successfully completed a course at degree level in the UK of a minimum duration of 4 academic years, and will follow a course of study at Master's degree level sponsored by a Sponsor that is a Recognised Body or a body in receipt of public funding as a higher education institution from the Department of Employment and Learning in Northern Ireland, the Higher Education Funding Council for England, the Higher Education Funding Council for Wales or the Scottish Funding Council, and the grant of leave to remain must not lead to the applicant having spent more than 6 years in the UK as a Tier 4 (General) Migrant, or as a Student, studying courses at degree level or above; or ….”

9.
The new Tier 4 structure, including para 245ZX, came into effect on 31 March 2009 by virtue of HC 314. Paragraph 245ZX(ha), however, was inserted into the rule with effect from 6 April 2012 by virtue of HC 1888.

10.
It is not suggested in this appeal that the Lea Valley College is a “Recognised Body” or a “Higher Educational Institution” for the purposes of the Rules. The appellant’s application fell, therefore, to be determined by applying the initial paragraph of para 245ZX(ha), namely that the individual must not spend “more than 5 years in the UK as a Tier 4 (General) Migrant, or as a Student , studying courses at degree level or above” (our emphasis).

11.
In his submissions, Mr Ahmed accepted that the appellant could not meet the requirements of para 245ZX(ha). He accepted that the rule required that time spent at degree level by the appellant as a student under the pre-Tier 4 rules had to be taken into account in calculating the maximum period of “5 years” in para 245ZX(ha). That is plainly correct. To date, the appellant has been in the UK with 4 years (approximately) leave as a student at degree level (the foundation degree not counting for this purpose) and he now seeks a further 3 years leave (approximately) at or above that level to study a further course. Mr Ahmed did not suggest in his oral submissions that only the appellant’s time actually spent studying should be taken into account. (We did not understand Mr Ahmed to pursue the point made in para 12 of the grounds.) The evidence was that the appellant had ‘dropped out’ of his BSc course after 2 years. Again, in our judgment, that is correct. 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 245ZY(b)) counts towards the maximum 5 year period and whatever he chose 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).

12.
Instead, having accepted the appellant could not succeed under the Rules, Mr Ahmed relied upon the Tier 4 Policy Guidance (July 2012), especially para 87. He submitted that the Guidance stated that the maximum "5 year" period at degree level or above only included time as a Tier 4 Student. The Secretary of State had acted unlawfully by not applying this policy to the appellant and the judge had erred in law in rejecting that argument and dismissing the appeal.

13.
Mr Ahmed relied upon para 87 of the Tier 4 Policy Guidance (July 2012) which is in the following terms:

"87. In addition to the 3 years of permitted study below degree level for Tier 4 (General) Students and any time spent in the Tier 4 (Child) category, the time that a Tier 4 Student can spend studying at or above degree level will be limited to 5 years ...."

14.
The paragraph then goes on to state a number of exceptions, none of which are directly relevant to the appellant.

15.
Mr Ahmed submitted that para 87 excluded from the calculation of the "5 years" period any leave as a student under the pre-Tier 4 scheme. He submitted that the Secretary of State had, in this guidance, sought to overcome any unfairness caused to students who had already accrued a period of study in the UK at degree level prior to the introduction of the Tier 4 category and who would now be prejudiced by the imposition of a five year maximum period of study if it inhibited their ability to complete a degree already commenced. He submitted that the policy should be interpreted so as to avoid that unfairness by excluding pre-Tier 4 leave from the calculation of the maximum period of "5 years" study.

16.
We have no hesitation in rejecting Mr Ahmed's submissions.

17.
First, the wording of para 87 of the Policy Guidance is, in our judgment, clear and its meaning unequivocal. It fully reflects the terms of para 245ZX(ha). It states that a person who is a "Tier 4 Student" can only study at degree level or above for a maximum of "5 years". It does not exclude time spent in the past studying by a person who is now a Tier 4 Student, with leave as a student under the pre-Tier 4 rules. If that had been the intention in para 87 then the wording would, in our judgment, have had to read along the following lines with the words which we set out in italics included:

"The time that a Tier 4 Student can spend studying at or above degree level (as a Tier 4 Student) will be limited to five years ..."

18.
Without those words, the bullet-point captures the (now) Tier 4 student who has had the requisite student leave for a cumulative period of 5 years whether under the Tier 4 or former student rules.

19.
Secondly, there is no basis for believing, as Mr Ahmed's submissions would require, that the Secretary of State in July 2012, only three months after the "5 years" maximum period was inserted in the Rules on 6 April 2012, intended by the Guidance to change the position adopted by Parliament in the Rules

that periods of study at degree level prior to the introduction of the Tier 4 scheme should count towards the maximum period of study of “5 years”. It is clear to us that the Guidance is no more than a guide to the application of the Rules themselves. Mr Ahmed did not rely upon any part of the Guidance, apart from para 87, to demonstrate that the Guidance went any further than offering an explanation of the meaning and application of the Rules. Ms Martin drew our attention to para 54 of the Guidance. It is the first paragraph appearing under the heading “Tier 4 (General) Students”. It refers the reader to the relevant paragraphs of the Immigration Rules “for full details of the requirements of the Tier 4 (General) Student category.”

20.
Thirdly, if Mr Ahmed’s submissions were correct, then an anomaly would arise because of one of the exceptions set out in para 87 to the maximum of five years’ study. That is set out in bullet point 2 as follows:

“Those Tier 4 (General) Students studying for Masters degrees at a Recognised body or at a Higher Education Institution (HEI), following completion of an undergraduate degree where the duration of that degree course was four or five academic years. For these students the limit will be set at six years in total instead of five”.

21.
This bullet-point reflects an exception to the “5 years maximum” in para 245ZX(ha)(i). Looking at this at, or after, the time of the introduction of the “5 years” maximum on 6 April 2012, the policy contemplates someone applying to undertake a Masters degree who has already completed a degree course of four or five years. In April 2012, one or two of those years will have been prior to 31 March 2009 when the Tier 4 scheme came into effect. Indeed, it is likely to have been sometime after that date before applications arose where all of the 4 or 5 years spent studying a degree course fell after 31 March 2009. Importantly for our purposes, there would be no need for an extension of the maximum period of study at degree level or above from five to six years if the pre-Tier 4 period of study (before 31 March 2009) did not count towards the maximum period of “5 years”. If Mr Ahmed is right this paragraph is wholly unnecessary. Further, given that pre-Tier 4 leave is taken into account here, it would be curious, in our judgment, if this were the only situation when pre-Tier 4 leave as a student was taken into account.

22.
Finally, we would not accept Mr Ahmed’s submission that if the wording of para 87 is ambiguous (which it is not) we should interpret it so as to exclude pre-Tier 4 leave. We see no basis for adopting such an interpretation. As we have said, the clear import of this part of the Guidance is simply to offer an explanation of the application of the Rules in an accessible form for applicants and others. We do not accept Mr Ahmed’s submission that there is necessarily a potential for unfairness if the Rule is applied on its own terms. Certainly as regards further study at Masters level at a Recognised Body or Higher Educational Institution, any potential unfairness of the 5 years maximum is mitigated if an individual has completed an undergraduate degree lasting four or five years, because the maximum period is then set at six years (see para 245ZX(ha)(i)). We also note that the amendment to para 245ZX to include sub-para (ha) from 6 April 2012 was announced in March 2011 a year before it was implemented (Student Visas: Statement of Intent and Transitional Measures) . Further, para 245ZX(ha) is subject to a transitional provision that it does not apply to applications made before 6 April 2012 but not decided at that date (HC 1888).

23.

An individual cannot have a legitimate expectation of studying at degree (or above) level for an undefined period. The only expectation that an individual can legitimately have is that he or she will be permitted to study in accordance with the Immigration Rules in force at the date of decision (see Odelola v SSHD [2009] UKHL 25).

24.
For these reasons, para 87 does not support Mr Ahmed's submission that pre-Tier 4 periods of leave to study at degree level or above should be ignored in calculating the maximum "5 year" period of study. In our judgment, para 87 directly reflects the requirement in para 245ZX(ha) which Mr Ahmed accepted the appellant could not meet.

25.
Mr Ahmed did not seek to challenge on any other basis the judge's decision to dismiss the appellant's appeal.

26.
For the reasons we have given, the judge did not err in law in dismissing the appellant's appeal.

27.
This appeal to the Upper Tribunal is dismissed.

Signed

A Grubb

Judge of the Upper Tribunal