Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/10756/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 11 October 2013	**On 24 October 2013**

Before

UPPER TRIBUNAL JUDGE LATTER

Between

NATHAPAT KALONG

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

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

DETERMINATION AND REASONS

1. This is an appeal by the appellant, a citizen of Thailand born on 12 April 1982, against a decision of the First-tier Tribunal dismissing his appeal against the respondent's decision made on 20 March 2013 refusing to grant him an extension of leave to remain in the UK as a Tier 4 (General)

Student Migrant and to remove him from the UK under s.47 of the Immigration, Asylum and Nationality Act 2006.

Background

2. On 28 July 2008 the appellant was granted leave to enter the UK as a student until 21 June 2009. On 27 July 2009 an application for leave to remain as a Tier 4 (General) Student Migrant was refused, but on 23 March 2010 he was granted leave to remain in that capacity until 23 June 2010 and further extensions were granted until 14 January 2013. On 8 January 2013 the appellant made an application for further leave to remain to continue his studies.

3. Although the appellant was able to show that he could meet the points requirements of Appendices A and C, his application was refused, firstly on the basis that he did not satisfy the requirements of para 245ZX(h) in that a further grant of leave would exceed a period of three years of combined study below degree level, and secondly, that on his application form he had failed to disclose that on 14 January 2011 he had been convicted of driving with excess alcohol, using a vehicle while uninsured and driving otherwise than in accordance with his licence, and in consequence had failed to disclose material facts, leading to a refusal under para 322(1A).

The Hearing before the First-tier Tribunal

4. The appellant appealed against that decision and in his grounds said that it was not correct that he had not informed UKBA of his conviction for drink driving. The offence had occurred in January 2011 and his student visa expired on 6 July 2011. He had returned to Thailand before his visa expired and had applied for an extension and when doing so he had told the British Embassy of his conviction and he was still granted the student visa to continue his studies. When he applied for the further extension in January 2013, as he had already informed UKBA about his convictions, he did not think it was necessary to inform them again.

5. The appellant asked for the appeal to be determined on the papers and it was duly allocated for determination on 18 June 2013. The judge was not satisfied that he met the requirements of para 245ZX(h) for the reasons she gave in [10] of her determination. She then went on to consider the issue under para 322(1A) as follows:

> "11. Further, the appellant does not deny that he committed the offences referred to in the refusal letter. It is also clear that in his present application form, the appellant answered the first question of Section I by indicating that he had previously told UKBA about this, but the fact remains that his answer to the question in the present application is untrue. Notwithstanding what the appellant says about having previously told UKBA about the conviction in an application submitted via an Embassy, the appellant must have realised that his answer was

> not truthful. The appellant's application therefore did fall for automatic refusal under para 322(1A)."

6. The appeal against the decision to refuse further leave to remain was therefore dismissed, but the appeal against the removal decision was allowed on the basis that it was not in accordance with the law.

Grounds and Submissions

7. Permission to appeal was refused by the First-tier Tribunal but granted by the Upper Tribunal on the basis that it was arguable that the judge had erred in her assessment of whether the requirements of para 245ZX(h) were met and that she had not made a clear finding on whether the appellant had been dishonest when he failed to disclose his conviction to the respondent, given his evidence that he had informed an Entry Clearance Officer of it.

8. At the hearing before me it was conceded by Mr Duffy that the judge had erred in law in her assessment of whether the grant of further leave would lead to the appellant spending more than three years in the UK as a Tier 4 Migrant as his first course did not count because leave was granted as a student and not under the points based scheme.

9. Mr Solomon submitted that when assessing para 322(1A), the judge had failed to reach any adequate findings on the material matter of whether the appellant had completed the form dishonestly, particularly in the light of the fact that he had given an innocent explanation, and that an incorrect statement was not necessarily false. He referred to the judgment of the Court of Appeal in AA (Nigeria) v Secretary of State for the Home Department [2010] EWCA Civ 773. He argued that the fact that incorrect information had been given did not necessarily mean that it was dishonestly given.

10. Mr Duffy submitted that it was clear from the judge's findings that she was satisfied the appellant had been dishonest.

Assessment of whether the Judge Erred in Law

11. I am not satisfied that the judge erred in law in her assessment of whether a false representation or a failure to disclose material facts had been made within para 322(1A). This provides that leave to remain is to be refused

> "… where false representations have been made … (whether or not material to the application and whether or not to the applicant's knowledge) or material facts have not been disclosed in relation to the application …"

The judge properly directed herself that the burden lay on the respondent to prove any contested precedent fact when assessing para 322.

12. The explanation the appellant put forward was that he did not think he needed to declare the conviction as he had previously disclosed it in an earlier application. It was for the judge to decide what weight to give to that explanation. She found that the appellant must have realised that his answer was not truthful. That was a finding open to her on the evidence before her. The question at section I1 is clear. It reads;

> "Have you ever been convicted of a criminal offence either in the UK or in another country?"

The appellant ticked the box "No". Further, he signed the declaration at the end of the form, which included the following:

> "The information given in my application is complete and is true to the best of my knowledge and belief."

By finding that the appellant must have realised that his answer was not truthful, the judge was clearly satisfied that the respondent had established that the answer was given dishonestly.

13. Therefore, although it is accepted that the judge was wrong about whether the provisions of para 245ZX(h) were engaged, her findings that a false representation had been made or that a material fact had not been disclosed were properly open to her for the reasons she gave. In the light of the date when the removal decision was made, that decision was set aside as not in accordance with the law. That decision remains to be made by the respondent. As I indicated at the hearing, it is open to the appellant to make any further representations to the respondent before that decision is made.

Decision

14. The First-tier Tribunal erred in law on the issue of para 245ZX(h). This is not a case where the decision should be set aside as leave to remain fell to be refused in the light of the false representation/failure to declare a material fact made in the application form. Accordingly, this appeal is dismissed.

Signed Date: 24 October 2013

Upper Tribunal Judge Latter