



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/29503/2014  
IA/29496/2014

THE IMMIGRATION ACTS

Heard at Field House  
On Monday 10 August 2015

Determination Promulgated  
On Friday 14 August 2015

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MRS UNNATIBEN KETANKUMAR BHOJAK  
MR KETANKUMAR VENIRAM BHOJAK  
(ANONYMITY DIRECTION NOT MADE)

Appellants

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr H Patel, Solicitor

For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

**Anonymity**

*Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008*

No anonymity order was made by the First-tier Tribunal. I find that no particular issues arise on the facts of this case that give rise to the need for a direction. For this reason no anonymity direction is made.

## DECISION AND REASONS

### Background

1. The First Appellant is a citizen of India. She appeals against the Respondent's decision dated 7 July 2014 to refuse to vary her leave as a Tier 4 student on the basis that if leave were granted she would have spent more than five years studying at degree level or above and therefore that she could not satisfy paragraph 245ZX(ha) of the Immigration Rules ("the Rules"). The Second Appellant is the First Appellant's dependent spouse.
2. The Appellants' appeal was dismissed by First-Tier Tribunal Judge Mayall in a decision promulgated on 7 January 2015 ("the Decision"). The Judge found that paragraph 245ZX(ha) related to the period of leave rather than the period of actual study in accordance with the case of Islam (Para 245ZX(ha): five years' study) [2013] UKUT 608 (IAC) ("Islam") and on that basis, the First Appellant could not meet the rule.
3. Permission was granted by Upper Tribunal Judge Perkins on 2 June 2015 on the basis that it was arguable that the Judge had not properly applied Islam. Permission was not granted to argue that Islam was wrongly decided. The matter comes before the Upper Tribunal to determine whether the First-tier Tribunal Decision involved the making of an error of law.
4. The First Appellant has been granted three periods of leave as a Tier 4 student. She was refused leave on her fourth application on the basis that she could not meet paragraph 245ZX(ha) of the Rules as the grant of the fourth period of leave would take her beyond the five years permitted by that rule.

### Submissions

5. Mr Patel confirmed that the issue between the parties concerns two periods of leave. There is no dispute between the parties that the first period of leave was for study below degree level and therefore did not count towards the period of five years for the purposes of paragraph 245ZX(ha). There is also no dispute that the period to be counted towards the five years in relation to the fourth period which is the subject of the refusal decision under appeal is nineteen months. The issues therefore arise in relation to the second and third period of study.
6. The First Appellant began her second period of study on 17 May 2010 with leave to study until April 2013. She stopped studying as she was pregnant and gave birth to her daughter on 12 March 2011. She was reported to the Home Office by her college sponsor on 21 March 2011 and prevented by that sponsor from resuming her studies with it after the birth. The Home Office took no action on the report that she had ceased studying until 1 June 2012 when her leave was curtailed to end on 31 July 2012. The issue in relation to this period is therefore whether the period should end on 21 March 2011 when her college reported that

she had ceased to study, on 1 June 2012 when the Home Office had issued the curtailment letter or when leave was curtailed on 31 July 2012. The periods which would count towards the five years would be eleven months, twenty-five months or twenty-seven months respectively.

7. The First Appellant then applied to study at West City College Ltd and was issued a CAS for a course with a start date of 27 August 2012 and an expected end date of 15 February 2014. This sponsor was A rated Mr Patel submitted, the First Appellant was not therefore permitted to study until she was granted leave. She was granted leave on 28 February 2013 to 15 June 2014. Mr Patel submitted that the period from 27 August 2012 to 28 February 2013 should be left out of account because the First Appellant could not have studied in that period as she did not have leave. He also submitted that the period from 28 February 2014 to 15 June 2014 should be left out of account as the Home Office's Tier 4 guidance indicated that such periods should be disregarded. In support of this submission, Mr Patel pointed to the guidance which indicates at paragraph 109 that periods granted before or after the main course of study as referred to in the table set out earlier in the guidance are to be disregarded for the purposes of calculating the maximum time spent studying at degree level or above. The table shows that for a course of 12 months or more the length of stay allowed is the length of the course plus four months. Mr Patel also pointed to the Statement of Changes to the Rules which came into force on 3 August 2015. Those obviously do not apply in this case but show that paragraph 245ZY(b)(iii) has been amended from that date to show that such periods are henceforth to be included and not disregarded. If this third period is properly calculated from the grant of leave and not the start date of the course in the CAS, then the start date is 28 February 2013 and if the end date should exclude the period from 28 February 2014 to 15 June 2014, Mr Patel submitted, the relevant period is in fact 12 months and not either 18 months (from August 2012 to February 2014) or 15 months (February 2013 to June 2014).
8. Mr Patel therefore submitted that the Judge had erred in the Decision in finding that the two periods in dispute should be calculated from 7 May 2010 to 31 July 2012 as to the first and 27 August 2012 to 15 June 2014 as to the second and on that basis to find that, after the latest period was added, the First Appellant would be spending more than five years studying at degree level or above.
9. Mr Bramble accepted that, in relation to the second period in dispute, this should be calculated from 28 February 2013 and not August 2012 (as the Home Office database notes confirm). He submitted that in accordance with the decision in Islam, the period counting towards the five years is the period of leave which has been granted. On that basis, the first period should be from 7 May 2010 to 31 July 2012 and the second period should be from 28 February 2013 to 15 June 2014. At paragraph 11 of Islam, the Upper Tribunal stated 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 para 245ZX(ha).*" Mr Bramble very fairly accepted though that on a reading of paragraph 245ZX as was in force at the date of the Secretary of State's

decision in this case and the Tier 4 guidance, the period of four months from 28 February 2014 to 15 June 2014 should be left out of account.

### **Decision and reasons**

10. At the end of the hearing, after considering the grounds of appeal and oral arguments, I indicated that I found there to be an error of law in the Decision and accordingly, I set that aside. I also indicated that I would remake the Decision by allowing the Appellants' appeal. I indicated that I would provide my full reasons in writing and I do so below.
11. In relation to the first period in dispute, I do not consider that the Judge erred. In accordance with Islam, the period of leave granted is what counts and not the period during which the First Appellant was actually studying. Whilst Mr Patel is entitled to complain on the First Appellant's behalf about the delay in the Home Office curtailing her leave once informed by the sponsor that she was not studying, it is equally incumbent on the First Appellant to keep the Home Office informed. She may have thought that her sponsor would allow her to resume studies after the birth of her child but when it was clear that this was not the case, she should either have informed the Home Office herself that she was not studying, have returned to her home country to apply for another course or chased the Home Office for a 60 day letter to allow her to resume studies. She did none of those things and she therefore only has herself to blame if she is now prejudiced by the counting of that period as part of her period of studies for the purposes of paragraph 245ZX(ha). Accordingly, the period to be included in relation to the first period in dispute is twenty-seven months.
12. However, I do find that the Judge erred in the calculation of the second period in dispute. The case of Islam considered a different issue and was not concerned with the very clear provisions in the Rules (prior to 3 August 2015) and the guidance that the periods granted before and after the course of study are to be disregarded for the purposes of paragraph 245ZX(ha). Accordingly, the relevant period is from 28 February 2013 (when leave was granted) to February 2014 (when the course ended).
13. In accordance with paragraphs 11 and 12 above, the periods to be counted towards the five years under paragraph 245ZX(ha) are twenty-seven months in relation to the first period and twelve months in relation to the second. Adding those two periods to the nineteen months which it is agreed is the relevant period in relation to the refusal which is the subject of this appeal gives a total of fifty-eight months which is less than the five years permitted by paragraph 245ZX(ha). I therefore allow the First Appellant's appeal. The Second Appellant is the First Appellant's dependent and I therefore also allow his appeal.

**DECISION**

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

I set aside the Decision

I re-make the Decision in the appeal by allowing the appeals.

Signed

A handwritten signature in black ink, appearing to read 'E. Smith', written in a cursive style.

Date

12 August 2015

Upper Tribunal Judge Smith