UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER) **APPEAL NUMBER: IA/11062/2015**

THE IMMIGRATION ACTS

Heard at: Field House **Decision and Reasons**
on 4 July 2016 **on 29 July 2016**

Before

Deputy Upper Tribunal Judge Mailer

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR YOUSUF MOLLA
NO ANONYMITY DIRECTION MADE

Respondent

Representation

For the Appellant: **Mr P Duffy, Senior Home Office Presenting Officer**
For the Respondent: **Mr M K Hasan, Kalam Solicitors**

DETERMINATION AND REASONS

1. I shall refer to the appellant as "the secretary of state" and to the respondent as "the claimant."

2. The secretary of state appeals against the decision of the First-tier Tribunal Judge who allowed the claimant's appeal against the decision refusing his application for further leave to remain as a Tier 4 (General) Student Migrant. His application was refused on 10 February 2015.

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3. The secretary of state contended that a grant of leave to study his proposed course would result in his having spent more than five years in the UK as a Tier 4 (General) Student studying courses that consist of degree level study or above. He accordingly failed to meet the requirements of paragraph 245ZX(h) of the Immigration Rules. He had previously been granted leave to study courses at degree level or above for four years and two months. His current application was to study CTH BG Dip in Hospitality and Tourism Management until 26 August 2015.

4. It was contended that he had no right of appeal against the decision. However, the First-tier Tribunal Judge found that there was a right of appeal. That was correct as his application pre-dated the amendments to the 2002 Act. His application was made on 13 August 2014.

5. The Judge found that the success or failure of his appeal depended on the interpretation of paragraph 245ZX(h) which provides that an applicant must spend not more than five years "studying" courses at degree level or above.

6. At [16] the Judge construed the word "studying" to mean that in the period of time the claimant has been in the UK, he has engaged in studies. The Rule could not have meant to penalise applicants such as the claimant who was unable to complete his studies because the Home Office intervened by shutting down the college.

7. On 27 May 2016, First-tier Tribunal Judge Parkes granted the secretary of state permission to appeal against that decision.

8. Mr Duffy relied on the grounds of appeal. The total period of leave that the claimant had been granted together with the period of leave he would have been granted to pursue the course for which he made his recent application was more than five years. Further, the Judge wrongly construed the rule to mean that only the actual "studying time" was to be taken into account.

9. He relied on the Tribunal's decision in Islam (Para 245ZX (ha): 5 years' study) [2013] UKUT 00608 (IAC). At paragraph 11, Mr Ockleton, Vice President, stated that it had not been suggested that only the appellant's time actually spent studying should be taken into account. The evidence in that case was that the appellant had dropped out of his BSc course after two years.

10. The Tribunal concluded 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 245XZ(ha).

11. Mr Hasan submitted that the Judge correctly construed the Rules as the claimant could not have been "studying" at some of the relevant times. He submitted that it is the time granted for the purpose of studying that is relevant.

12. He noted that the appellant entered the UK on 2 August 2009. He was granted leave to enter which included an extra three months, on top of the two years' course. When he in fact entered he had 26 months' leave to remain. Those extra two months "were not study time". That resulted in his being over the limit permitted by the Rule. Accordingly, the time actually spent studying should be the basis of calculating the period under the rule. The result is that he would only be here for five years.

13. In reply, Mr Duffy submitted that the flaw in the argument is that most courses are in reality for a period of about nine months. The remaining period is usually "for holidays". That however is not relevant. There will inevitably be periods when there is no studying. He would nevertheless remain as a Tier 4 student even though he is not studying.

Assessment

14. The claimant had previously been granted leave to study courses at degree level for four years and two months. His current application will be to study a course until 26 August 2015. That would result in his having spent more than five years as a Tier 4 (General) Student.

15. In Islam, supra, the Tribunal held that it is the period of leave and not the actual study which is the measure for calculating the period spent in the UK which is imposed by paragraph 245ZX(ha). It is unfortunate that the Tribunal's decision in Islam was not drawn to the learned Judge's attention at the time.

16. I find that the decision of the secretary of state involved the making of an error on a point of law. I accordingly set it aside.

17. In re-making the decision, I find for the reasons referred to above, that a grant of leave to study his proposed course would result in his having spent more than five years in the UK as a Tier 4 (General) student studying courses that consist of degree level study or above. I accordingly find that the decision of the secretary of state was in accordance with the Immigration Rules.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. Having set the decision set aside I remake it and substitute a fresh decision dismissing the claimant's appeal.

No anonymity direction is made.

Signed Date 28/7/2016

Deputy Upper Tribunal Judge C R Mailer