Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/26592/2014**

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision and Reasons Promulgated**
On 6 January 2016	**On 12 January 2016**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

ASFANDYAR KHAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In person
For the Respondent: Mrs R Pettersen (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the appellant's appeal to the Upper Tribunal, brought with permission, against a decision of the First–tier Tribunal promulgated on 2 October 2014, dismissing his appeal against the respondent's decision of 3 June 2014 refusing to grant him further leave to remain as a Tier 4 (General) Student Migrant and deciding to remove him from the UK by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006.

2. The appellant, who was born on 22 July 1986, is a national of Pakistan. He entered the UK on 22 January 2012, as a student, having obtained entry clearance, abroad on 13 January 2012. He pursued a course of study which commenced on 13 February 2012 and ended on 17 January 2014.

He did not return to Pakistan at the end of that course, his having applied on 16 May 2014, one month prior to his previous grant of leave being due to expire, for further leave to remain as a Tier 4 (General) Student Migrant in order that he might pursue a different course of study which had been due to commence on 2 June 2014 and had been due to end on 26 June 2015. Both the previous course and the proposed new course were below degree level.

3. The respondent had taken the above decision to refuse leave to remain, and to remove the appellant, because she thought that if he received the leave he was seeking that would mean he had spent more than three years in the UK as a Tier 4 (General) Student Migrant studying courses which did not consist of degree level study and that such would mean his falling foul of the requirements of paragraph 245 ZX(h) of the Immigration Rules.

4. The appellant appealed to the First-tier Tribunal contending, in his grounds of appeal, that according to Home Office guidance, interruptions in studies should not be taken into account when calculating the three year period and that he had been granted study leave by his Tier 4 sponsor, for a period of 13 Days, during his first course, due to a serious illness. His contention at that stage was that when the 13 days were deducted it brought him within the three year limit.

5. The appeal was listed for an oral hearing. The appellant did not attend the hearing and was not represented. It was noted in the determination that it was apparent from the case file that a notice of hearing had been sent to him at the address given in his notice of appeal, that that was his last known address and that the notice had been returned marked "addressee gone away". The First-tier Tribunal decided to go ahead and hear the appeal, in the absence of the appellant, on the basis that the notice had been properly sent. The respondent was represented, at the hearing, by Counsel.

6. The First-tier Tribunal dismissed the appellant's appeal concluding, in relation to the claimed period of illness, that some medical evidence the appellant had provided did not show that his illness was so debilitating that he had been unable to undertake his studies during the 13 day period referred to above. He noted that the guidance which the appellant had referred to had said that only interruptions to studies resulting from "compelling and compassionate circumstances" would be deducted when calculating the relevant three year period. Judge North thought that that requirement had not been met. Having reached those findings, and in closing, he said this:

> " 9. The appellant's previous study below degree level had been for a period of 1 year and 11 months. In his application, he said that he proposed to continue to study until 26/06/2015 starting on 02/06/2015. Taken together the appellant proposed to study below degree level for more than the 3 years allowed as a Tier 4 (general) student. He did not therefore meet the requirements of paragraph 245 ZX(h) of the Immigration Rules.
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> 10. The appeal was brought on no other grounds."

7. The appellant applied, with the assistance of his then representatives, for permission to appeal to the Upper Tribunal. The grounds advanced, asserted that the First-tier Tribunal had incorrectly calculated the three year period and quoted from the "Tier 4 Policy Guidance version 08/2014 page 16 of 79" in support of that proposition. It was argued that, in fact, the total period of study if the appellant had pursued the course he had intended to would have led to his having spent two years, 11 months and 24 days studying courses below degree level. It was also contended, in effect, that there had been procedural unfairness resulting from the First-tier Tribunal proceeding to hear the appeal in the appellant's absence because the appellant had changed his address and in consequence had not known about the hearing. It was accepted, though, that he had not informed the First-tier Tribunal of the change of address.

8. Permission was initially refused by a judge of the First-tier Tribunal. The application was then renewed to the Upper Tribunal although the grounds then advanced only relied upon the point regarding the calculation of the three year period. It seems to me that it was realistic not to seek to pursue, any further, the other ground regarding procedural unfairness.

9. On 12 March 2015 a Deputy Upper Tribunal Judge granted permission to appeal and said this:

> " There is only one ground of appeal before the Upper Tribunal and that is based upon paragraph 9 of the determination. The judge stated that the appellant's previous study below degree level had been for a period of 1 year and 11 months. The proposed new course ran from 2 June 2014 to 26 June 2015. The ground of appeal asserts that a period of 1 year and 11 months plus another period of 1 year and 24 days add up to less than 3 years in total. I find that as a matter of simple addition, there is an arguable point of law because the time period stated in the determination do not support the conclusion stated in paragraph 9 that, taken together, the appellant proposed to study for more than 3 years.
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> Permission to appeal is therefore granted on the sole ground that is before the Upper Tribunal."

10. There was then a hearing before the Upper Tribunal (before me) to consider whether the decision of the First-tier Tribunal ought to be set aside on the basis of legal error and, if so, how the decision should be remade.

11. At the hearing the appellant, who no longer had legal representatives, attended and represented himself. The respondent was represented by Mrs R Petterson.

12. After some discussion Mrs Pettersen accepted that the appellant had actually been studying, in the UK, below degree level, for a period of two years, 11 months and 28 days. She accepted, having considered the wording of paragraph 245 ZX(h) of the Immigration Rules that the three year period related to time spent actually studying on a course as opposed to time spent in the UK with leave. The latter is always likely to be more than the former. She accepted that the First-tier Tribunal, seemingly having been entirely understandably distracted by the illness point, had failed to make the appropriate calculations.

12. In light of the above and Mrs Petterson's very fair concessions, I have concluded that I must set aside the decision of the First-tier Tribunal on the basis that it did not have regard to material matters relating to the precise dates the appellant had actually spent in the UK studying. Accordingly, I set its decision aside.

13. Given Mrs Petterson's acceptance of the above calculations and her view as to the law, which seem to me to be correct following the slightly unclear wording of the relevant Immigration Rule, I go on to remake the decision and to allow the appeal. Given that the course which the appellant had intended to pursue has now come to an end I am not sure where that leaves him. However, his appeal to the Upper Tribunal does succeed.

Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law and is set aside.

I remake the decision and, in so doing, I allow the appellant's appeal.

Signed Date

Upper Tribunal Judge Hemingway

TO THE RESPONDENT:
FEE AWARD

Although I have allowed the appeal I make no fee award because I was not invited to do so.

Signed Date

Upper Tribunal Judge Hemingway