Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/03508/2014
IA/03520/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination promulgated**
On 9 July 2014	**On 16 July 2014**

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

Secretary of State for the Home Department

Appellant

and

(1) Bhagwati Dahal Thapaliya
(2) Bhishma Thapaliya
(No anonymity directions made)

Respondents

Representation

For the Appellant: Ms. J. Isherwood, Home Office Presenting Officer.
For the Respondents: Mr. T. Uppal of Glen Solicitors.

DETERMINATION AND REASONS

1. These are linked appeals against the decisions of First-tier Tribunal Judge White promulgated on 16 April 2014, allowing Mrs and Mr Thalapiya's appeals against the Secretary of State's decisions dated 19 December 2013 to refuse to vary leave to remain as, respectively, a Tier 4 (General) Student migrant and her dependant, and to remove them from the UK.

2. Although before me the Secretary of State is the appellant and Mrs and Mr Thalapiya are the respondents, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to Mrs and Mr Thalapiya as the Appellants and the Secretary of State as the Respondent.

Background

3. The Appellants are nationals of Nepal born on 21 February 1987 and 10 July 1981. They are wife and husband. At all material times Mr Thapaliya (the Second Appellant) has been treated for immigration purposes as the dependant of his wife and has been granted leave 'in line' with her. The outcome of his appeal depends upon the outcome of Mrs Thapaliya's (the First Appellant's) appeal.

4. The First Appellant's germane immigration history is:

   20 July 2009: Entered UK with leave valid to 27 September 2010 as a Tier 4 (General) Student migrant.

   25 Aug 2010: Variation of leave as a Tier 4 student, valid to 30 September 2011.

   24 Jan 2011: Variation of leave as a Tier 4 student, valid to 31 May 2014.

   19 Sep 2013: Decision to curtail leave with effect from 18 November 2013.

   13 Nov 2013: Application for variation of leave as a Tier 4 student to pursue course running from 18 November 2013 to 16 January 2015.

   19 Dec 2013: Refusal of application.

5. The First Appellant's application of 13 November 2013 was refused for reasons set out in a combined Notice of Immigration Decision and 'reasons for refusal' letter ('RFRL') dated 19 December 2013, with particular reference to paragraph 245ZX(ha) of the Immigration Rules. It was the Respondent's case, in effect, to quote from the Rule applied, that "*the grant of leave to remain the applicant [was] seeking [would] lead to the applicant having spent more than 5 years in the UK as a Tier 4 (General) Migrant… studying courses at degree level or above*", where no relevant exception to the generality of the Rule applied. The courses that the

First Appellant had pursued were identified in the Notice of Immigration Decision/ RFRL as being a level 6 advanced diploma in business management, a level 7 BTEC Diploma in Management and Leadership, and a level 7 ACCA course; the current application was identified to be a level 7 MBA.

6. The Second Appellant was refused 'in line' with his wife.

7. The Appellants appealed to the IAC. In respect of paragraph 245ZX(ha) the Appellants argued in their Grounds of Appeal that the five-year period was to be calculated by reference to actual time spent on courses rather than by reference to the periods of leave granted. The Appellants did not raise any issue as to the level of courses that the Appellant had pursued.

8. The First-tier Tribunal Judge, after a consideration without a hearing 'on the papers', allowed the appeals under the Immigration Rules for reasons set out in his determination: see further below.

9. The Respondent sought permission to appeal to the Upper Tribunal which was granted on 21 May 2014 by First-tier Tribunal D'Imécourt.

Error of Law

10. Notwithstanding the basis upon which the Appellants put their case, and in particular that they did not dispute that the First Appellant's courses had been at 'degree level or above', the First-tier Tribunal Judge took a different approach. Further, in consequence of taking a different approach, in the event the Judge did not engage with the substance of the Appellants' Grounds of Appeal.

11. At paragraph 13 the Judge determined, without reference to any materials and without any specific reasoning, that "*the diploma courses are clearly below degree level*". The Judge also determined, in reliance upon **Mirza (ACCA Fundamental level qualification – not a recognised degree) [2013] UKUT 41 (IAC)**, that the level 7 ACCA course was not at degree level or above, because it was not a degree course.

12. Mr Uppal, fairly and properly, does not seek to support the Judge's findings in respect of the diploma courses. The Judge was plainly in error. The definition section of the Immigration Rules, paragraph 6, defines 'degree level study' as including "*a course which leads to a… qualification at level 6 or above*". The Judge manifestly did not direct himself to this provision, and erred in consequence.

13. Although Mr Uppal sought - opportunistically bearing in mind this argument had not been advanced on behalf of the Appellants in support of their appeals to the First-tier Tribunal - to rely upon the Judge's reasoning consequent upon **Mirza**, I have little hesitation in concluding that the Judge also erred in this regard.

14. The key finding in **Mirza** is that the ACCA does not have degree awarding powers and therefore its qualifications are not UK recognised degrees. The context of such a finding was the particular requirements of Table 10 of Appendix A of the Rules and specifically the stipulation that an applicant should have been awarded "*a UK recognised Bachelor degree, Masters degree or Ph.D (not a qualification of the equivalent level which is not a degree)*". This is a narrower stipulation than the definition of 'degree level study' at paragraph 6 of the Rules. The finding in **Mirza** is not a finding that a level 7 ACCA course does not constitute study at a level equivalent to degree level. In my judgement such a course is at a level equivalent to degree level or above: I also bear in mind in this context that the Appellants had not previously disputed this, and have only sought to dispute it at this stage in reliance upon Judge White's erroneous reasoning.

15. In the circumstances I find that the Judge misdirected himself in law and erred in concluding that the level 7 ACCA course was not a course at 'degree level or above'.

16. The decision of the First-tier Tribunal Judge must be set aside accordingly.

Re-making the Decision

17. The decision in the appeal can readily be remade before the Upper Tribunal without hearing further evidence. The analysis above in respect of course levels necessarily informs the remaking of the decision. In reliance upon that reasoning I find that at all material times

the First Appellant has pursued courses in the UK at degree level or above.

18. The issue in the appeal therefore becomes the one initially raised by the Appellants in their Grounds of Appeal to the First-tier Tribunal: whether the five-year period specified in paragraph 245ZX(ha) refers to the overall period of leave or the overall period of study.

19. I have little hesitation in concluding that the five-year period is in respect of the overall period of leave.

20. In my judgement the words "*studying courses at degree level or above*" in paragraph 245ZX(ha) qualify the basis or purpose of the Tier 4 or Student leave that has been granted to the applicant or Student, and are not to be read as qualifying the words "*more than 5 years*". It seems to me that the key words "*as a*" in the phrase "*more than 5 years in the UK as a Tier 4 (General) Migrant*" indicate that in according the Rule its plain and natural meaning the 5 years is to be understood as denoting the period of leave in the capacity of a Tier 4 Migrant or Student. When a Tier 4 migrant with extant leave is not studying - whether that be because they are on vacation, or because they are between courses - they are still present in the UK as a Tier 4 Migrant.

21. Mr Uppal placed reliance upon the Respondent's published guidance in respect of Tier 4 (v13.0) (helpfully reproduced at page 6 of the Appellants' Bundle). In particular, he relied upon the words "*To be granted leave as a Tier 4 (General) migrant a person must: … not spend more than five years studying at degree level or above*". He contended that this reinforced the Appellants' submission that it was the period of studying rather than the period of leave that was germane. I bear in mind that the Rules are the primary source for a decision-maker, and for understanding their meaning: any guidance is subsidiary. I accept that there is an ambiguity in the way that the guidance is set out. However, I do not accept that this alters the plain and natural meaning of the words in the Rule which is aimed at considering the overall periods of leave granted to a person wishing to pursue study at degree level or above. In my judgement it is clear that the Rule denotes that five years *leave* in such a capacity is intended as a maximum period.

22. I acknowledge that the overall period is to be calculated in this particular case taking into account that leave was curtailed with effect

from 18 November 2013 by Notice dated 19 September 2013. The Appellants go further, and argue that rather than the date of curtailment of leave, time should be calculated up to the date of the revocation of the course provider's licence (5 August 2013) that gave rise to the curtailment. I do not accept this submission: the germane period is the period of leave, not the period of qualifying study. In any event, the submission does not avail the Appellants as the grant of leave sought by the First Appellant to pursue a course ending in January 2015 would have resulted in exceeding the five years specified in 245ZX(ha) even on the revised calculation contended.

23. Further in this context I note the submission made by Mr Uppal to the effect that the revocation of sponsor's licence and the Appellant's associated necessary abandonment of that particular course of study should mean that the period of time spent in the UK pursuing a course that could not then be completed should not count towards the five years. In my judgement the submission is without merit; the unfortunate circumstance of the disruption of study does not alter the fact that First Appellant was present in the UK as Tier 4 Migrant who was studying a course at degree level or above.

24. In all the circumstances I conclude that the Respondent's decision in respect of the First Appellant was in accordance with the Immigration Rules. The concomitant decision to refuse the Second Appellant variation of leave was also in accordance with the Rules. The Appellants' appeals are dismissed under the Rules accordingly.

25. Although reference is made to Article 8 in the Grounds of Appeal to the First-tier Tribunal, and reference is also made in the First Appellant's witness statement of 27 February 2014 at paragraph 5 by reference to her study, Mr Uppal confirmed to me that no Article 8 grounds were now pursued by the Appellants. This was sensible in light of **Patel and others [2013] UKSC 72** (see in particular per Lord Carnwath at paragraph 57); see also **Nasim and others (Article 8) [2014] UKUT 00025 (IAC)**.

26. There is no other challenge to the section 47 removal decisions.

Decisions

27. The decisions of the First-tier Tribunal Judge were each based on a material error of law and are set aside.

28. I re-make the decisions in the appeals. The appeals are dismissed.

Deputy Judge of the Upper Tribunal I. A. Lewis 16 July 2014