Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/08452/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 8 April 2014	**On 29 April 2014**

Before

The President, The Hon. Mr Justice McCloskey and
Upper Tribunal Judge Clive Lane

Between

USMAN ASGHAR

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Atif Wattoo of Sky Solicitors Ltd.
For the Respondent: Mr Paul Duffy, Senior Home Office Presenting Officer

DECISION AND DIRECTIONS

1. The Appellant is of Pakistani nationality and is now aged 28 years. His appeal to the Upper Tribunal has its origins in a decision made on behalf of the Secretary of State for the Home Department (hereinafter the *"Secretary of State"*), dated 7 March 2013, whereby his application for leave to remain in the United Kingdom as a Tier 4 (General) Student Migrant under the Points Based System was refused. The First-tier

Tribunal (the *"FtT"*), in a paper determination, dismissed the ensuing appeal.

2. In the somewhat elaborate chain of legal events which followed, permission to appeal to this Tribunal was ultimately granted following an initial refusal, a challenge to such refusal by a judicial review application and an Order of the Administrative Court granting leave. This was followed by an Order of the Administrative Court Master quashing the Upper Tribunal decision to refuse permission to appeal as uncontested. This process culminated in a reconsideration and the grant of permission to appeal by Upper Tribunal Judge Southern on 17 February 2014.

3. The starting point in the Immigration Rules is paragraph 6, which contains an extensive series of definitions. These include, amongst many others, the following provision:

> ***" 'degree level study'*** *means a course which leads to a recognised United Kingdom degree at bachelor's level or above, or an equivalent qualification at Level 6 or above of the revised National Qualifications Framework ....."*

Part 6 of the Rules regulates the subject of persons seeking to enter or remain in the United Kingdom in specified capacities. Within this maze of provisions, paragraph 245ZT and following constitute a discrete code governing those who apply for membership of the category of "Tier 4 (General) Student". One section of this code is introduced by paragraph 245ZX which, under the rubric "Requirements for Leave to Remain", states the following:

> *"To qualify for leave to remain as a Tier 4 (General) Student under this Rule, an applicant must meet the requirements listed below. If the applicant meets these requirements, leave to remain will be granted. If the applicant does not meet these requirements, the applicant will be refused"*.

There follows a series of "requirements" which are arranged, in sequence, in sub-paragraphs (a)-(m). These specify, to begin with, the general requirements that the applicant must not fall for refusal under the general grounds for refusal, must not be an illegal entrant and must have been granted entry clearance, leave to enter or leave to remain in the capacity of, *inter alia*, Tier 4 (General) Student.

4. Within the remainder of paragraph 245ZX there are certain provisions designed to confine the length of stay in the United Kingdom of a Tier 4 (General) student to specified maximum periods. In some instances, these are three years. In others, they are five years. It is common case that the main issue arising for determination in this appeal relates to paragraph 245ZX (ha). This is one of the lengthy menu of requirements which the applicant concerned "must" satisfy in order to secure leave to remain. It provides:-

> *"If the course is at degree level or above, the grant of leave to remain the applicant is seeking must not lead to the applicant having spent more than five years in the UK as a Tier 4 (General) Migrant or as a student, studying courses at degree level or above, unless .... ".*

The word *"unless"* is followed by three sub paragraphs, which are clearly designed to operate as exceptions to the requirement specified in (ha). It is common case that the Appellant is unable to avail of any of these exemptions.

5. The relevant particulars and calculations contained in the Secretary of State's refusal letter are as follows:

(a) From 12 September 2006 to 31 December 2007, the Appellant had leave to remain to study a one year post graduate accountancy diploma. The parties are agreed that this was not a degree level or above course of study.

(b) From 17 January 2008 to 30 November 2008 and from 20 February 2009 to 31 March 2009, the Appellant had leave to remain to study a three year bachelor degree course in Business Administration at two successive institutions.

(c) From 1 July 2009 to 30 September 2012, the Appellant had leave to remain to study a three years BA (Honours) International Business Management Course at the London College of Accountancy.

6. This gives rise to the following analysis:

(a) Initially, the Appellant completed a one year postgraduate diploma course in accountancy.

(b) From September 2007 to March 2009, he attempted to complete a BBA course, belonging to the level of degree or above, but was unable to do so due to one college closing unexpectedly and the next one being unrecognised by the Secretary of State.

(c) From July 2009 to September 2012, the Appellant successfully completed the BBA course, following the two earlier unsuccessful attempts.

At this juncture, the Appellant applied for further leave to remain in the United Kingdom. His application was made on 1 October 2012. At this stage, he had been studying, in various guises and during sundry periods, in the United Kingdom since his initial entry on 19 September 2006 i.e. for over 6 years. He sought permission for further leave to remain in the United Kingdom to study the London School of Business and Finance CIMA (the Chartered Institute of Management Accountants)

Level 6 course, scheduled to run between 22 October 2012 and 22 May 2014. The rationale of the ensuing refusal decision was that the Appellant's successive grants of leave to remain in the United Kingdom had been based on five years studying at degree level or above. This calculation, correctly, excluded the first of the six years under scrutiny, which concerned the one year postgraduate diploma in accountancy.

7. In granting permission to apply for judicial review, Stewart J stated:

> *"The FtT decision does not address whether the CIMA course is 'degree level or above' for the purposes of paragraph 245ZX (ha).*

The learned Judge's analysis of the FtT decision is, indisputably, correct. The consideration which the FtT Judge gave to the issues focused, rather, on the Appellant's membership of the separate categories of Student and Tier 4 (General) Migrant. The FtT gave no consideration to the question of whether the proposed course is at *"degree level or above"*.

8. Against this framework, the mainstay of the arguments advanced by Mr Wattoo on behalf of the Appellant is that, as a matter of fact, the CIMA course which the Appellant is proposing to study and which forms the basis of his application for further leave to remain in the United Kingdom is a course which is <u>not</u> *"at degree level or above"*. This argument was based on the proposition that CIMA is a body analogous to the ACCA which is not competent to award the qualification of degree, having regard to the decision in <u>Syed v Secretary of State for the Home Department</u> [2014] EWCA Civ 196. The submissions on behalf of the Secretary of State laid emphasis of the definition of *"degree level study"* in paragraph 6 of the Immigration Rules (*supra*) and, in particular, the words *"a course which leads to a recognised United Kingdom degree at bachelor's level or above* ***or an equivalent qualification at Level 6 or above of the revised National Qualifications Framework****"* [emphasis added].

9. It was not disputed that the CIMA course of study which the Appellant aspires to pursue culminates in the grant by the relevant competent body of a qualification at Level 6 or above of the revised National Qualifications Framework which is equivalent to a recognised United Kingdom degree at bachelor's level or above. As the further definitions of the terms "*UK recognised body"* and *"UK listed body"* make clear, it is immaterial, for the purposes of the Rules, that the course provider is not competent to confer the qualification of degree at bachelor's level or above or an equivalent qualification as defined. The test, rather, is whether the course *"leads to"* such a qualification, conferred by an approved agency. This test is satisfied in the present context. This analysis yields the conclusion that there is no merit in the

Appellant's main ground of appeal. While there was a demonstrable error of law in the determination of the FtT, it is not material, since the correct approach would have stimulated the same result namely a dismissal of the appeal.

10. The second ground of appeal advanced on behalf of the Appellant involved developing an argument which focused on the word *"studying"* in paragraph 245ZX (ha). It was submitted that the Appellant could not be considered to have been *"studying"* during 21 months of the overall period under scrutiny having regard to the evidence in his new witness statement (summarised above) that there were gaps totalling some 21 months in his studies due to the problems concerning the two educational establishments in question.

11. The main riposte to this argument is uncomplicated. Bearing in mind that the CIMA course which the Appellant was proposing to pursue operates from October 2012 to 22 May 2014 and juxtaposing this with the Appellant's calculation commencement date of 12 September 2006, the deduction of 21 months from this overall period results in a shorter period which exceeds the five year maximum by almost 12 months. Thus this argument, even if sound, does not avail the Appellant. Given this analysis, it is unnecessary for this Tribunal to attempt any elaborate or comprehensive definition of the word "studying", which is undefined. However, we would add, albeit *obiter*, that we agree with Upper Tribunal Judge Grubb that the relevant measures, or criteria, in these provisions of the Rules, as currently framed, are those of status and purpose: see Islam [2013] UKUT 608. While those devising these provisions of the Rules could have opted for the not unfamiliar mechanism of elaborate and intricate computations of time involving qualifying and non-qualifying periods, they did not do so. We find no warrant for excluding from the simple calculations which the Rules, as currently framed, require periods during which the student's studies were not continuous by reason of breaks or interruptions. Such phenomena, in our view, have no impact on either the status of the person concerned or the purpose of the grant of leave to remain and, therefore, are to be disregarded in the computation of any of the prescribed maximum periods.

12. In argument, a third ground of appeal was developed on behalf of the Appellant. This was to the effect that the decision on behalf of the Secretary of State was vitiated by unfairness, by reference to the decision of the House of Lords in O'Reilly v Mackman [1983] 2 AC 237 and Patel [2011] UKUT 00211 (IAC). This was canvassed as something of a makeweight. Based on the construction of the relevant provisions of the Rules which we have espoused above, we find no merit in this contention. The impugned provisions of the Rules represent a choice which was reasonably and rationally open to the legislature and their proper construction is a matter of law, to be contrasted with an enquiry into rationality or fairness in the broad sense. No direct challenge to the Rules themselves has been properly formulated in any event.

DECISION

13. We decide as follows:

(i) At the hearing, an application was made on behalf of the Appellant for the adduction of new evidence. We considered the bundle provided *de bene esse* and reserved our ruling. Applications of this kind are governed by rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008. The application was irregular and unsatisfactory as it was not made either on notice to the Respondent or in writing and did not include, as required by the rule, an explanation of why the evidence was not presented at first instance. Notwithstanding these irregularities, we have decided to accede to the application in the exercise of our discretion, as this means that our substantive decision has entailed consideration of the Appellant's case at its zenith thereby enhancing, we trust, the values of certainty and finality.

(ii) For the reasons elaborated above, we dismiss the appeal and affirm the decision of the FtT.

Signed:

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 9 April 2014