Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/23147/2014
IA/23148/2014

THE IMMIGRATION ACTS

Heard at: Field House	**Determination Promulgated**
On: 16th October 2014	**On: 17th October 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

Kanchana Rajapakse Rajapakse Pathiranna Helage
Niranjan Thalath De Silva Siriwardane

Appellants

and

Secretary of State for the Home Department

Respondent

For the Appellant: Mr Hassan, Corbin and Hassan
For the Respondent: Ms Pal, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellants are both nationals of Sri Lanka. They appeal with permission the decision of the First-tier Tribunal (Judge Cox)[1] to dismiss their linked appeals against the Respondent' decisions to refuse to vary their leave to remain and to remove them from the United Kingdom pursuant to s47 of the Immigration Asylum and Nationality Act 2006[2].

[1] Appeal heard on the 22nd July 2014, determination promulgated 5th August 2014.
[2] 14th May 2014

2. The First Appellant was in the UK as a Tier 4 (General) Student Migrant and the Second Appellant, her husband, was here as her dependent. They applied to vary that leave so as to extend it. The First Appellant wanted to study for an MBA, having completed her bachelor's degree.

3. It is accepted that the case turns of the First Appellant; if she succeeds so too does her husband.

4. There was only one reason why the application was refused: paragraph 245zx (ha) the Immigration Rules. That reads as follows:

> "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 5 years in the UK as a Tier 4 (General) Migrant, or as a student, studying courses at degree level or above.."

   The Respondent's records showed that the First Appellant had previously been granted leave to remain for a total of 4 years and 2 months to study at degree level or above, and that if she were to be given a further year to take her MBA that would take her to over five years.

5. On appeal the First-tier Tribunal set out the Appellants' immigration history. It is recorded that they landed in March 2008 with leave as Tier 4 Migrants and that this leave was thereafter extended on a number of occasions. All of the grants of leave were to study at degree level or above. The Appellants' case was however that the First Appellant had only in fact studied at degree level for a period of three years 2 months and 22 days. That is because soon after she entered the UK she switched courses and colleges. Instead of studying at degree level at EThames Graduate School she in fact went to study for a below-degree level diploma at LTC College in London. The Respondent had been informed about this switch in Tier 4 Sponsor by both the Appellant and LTC college. Having recorded these submissions the determination reads:

> "21. I note that there is a gap in the Appellant's chronology between May 2009 and April 2011 and that the Appellant's [subsequent] course at LSBF was at level 7. The Appellant has not provided any evidence as to what she was doing during the period from the end of her years studying at the LTC college and the commencement of her course at the LSBF in April 2011. In the absence of this evidence, I am satisfied that the reasonable inference to draw is that she was studying at level 6. Especially as I believe the Appellant would not have been able to study at level 7 in April 2011, unless she had successfully studied a course at level 6 (ie degree level)".

   The First-tier Tribunal found that the Appellants had not discharged the burden of proof and dismissed the appeals.

6. The Appellants now appeal on the grounds that the First-tier Tribunal failed to make findings of fact on material issues, namely whether the First Appellant was correct in saying that she had in fact only studied at degree level for two months after she arrived, having transferred to a below-degree level course at LTC in May 2008. The "gap in chronology" mentioned at paragraph 21 of the determination was actually filled by below-degree level study and there was evidence of this before the Tribunal which is not mentioned in the determination. Had the First-tier Tribunal directed itself to consider that evidence it would have been apparent that the First Appellant has not been studying at degree level or above for any longer than the three years, 2 months and 22 days that she contended to be the case before the First-tier Tribunal.

7. The Rule 24 response indicates that the Respondent was not able to give any indication as to her position prior to the hearing since she could not locate the file. Before me Ms Pal had an opportunity to discuss the grounds of appeal with Mr Hassan and review the evidence that had been before the First-tier Tribunal. Having done so she opposed the appeal. It was her submission that paragraph 245ZX (ha) should be read in line with other provisions in the Immigration Rules which specify that it is the purpose for which leave was granted that counts, not what the applicant has actually been doing with her time. On that basis it would be irrelevant that the Appellant has actually studied for some of the time she has been in the UK at below degree level, since she was granted leave to enter on the basis that she would be taking a degree level course.

Error of Law

8. I find that the determination of the First-tier Tribunal contains an error of law such that it must be set aside. Even though this matter was determined on the papers it is evident from paragraph 17 that the Tribunal understood the Appellant's case. That was that from May 2008 she was not studying at degree level of above, until April 2011 when she started her ACCA course. She had provided documentary evidence to that effect, and that is mentioned at paragraph 19. The determination does not make adequate findings of fact on that contention. The determination makes no findings about what the Appellant was doing between May 2008 and May 2009 and the inference drawn at paragraph 21, that she must have been studying at level 6 immediately prior to commencing her ACCA course is irrelevant and unsupported by the evidence.

The Re-Made Decision

9. I make the following findings of fact. The Appellant arrived in March

2008 and studied at degree level for two months at EThames college between 15th March 2008 and 18th May 2008. She then switched to study below degree level at LTC (Certificate in Human Resource Management followed by a ABE Diploma in Human Resources Management Course), then Union College (Edexcel Higher National Diploma in Business Studies). This is evidenced by her enrollment letter from LTC dated 19th May 2008 (page 6 bundle), the letter to the Respondent informing them that she had switched course (page 7) her enrolment certificate dated 15th June 2009 from LTC (page 8) and the letter from Union College dated 10th March 2011 (page 9). She did not start study at degree level of above until April 2011 when she started to study for the ACCA exams at the London School of Business and Finance: see letter from the same dated 8th March 2011 (at 11). On the 17th April 2014 she started her MBA at the London School of Marketing. This means that she has spent the following periods studying at degree level or above since she arrived in March 2008:

15th March 2008 - 18th May 2008	2 months 4 days (EThames)
11th April 2011 – present	3 years, 6 months and 5 days (LSBF and LSM)

10. That is a total of 3 years, 8 months and 5 days, presuming that she has been studying continually and has had no break. Her MBA will finish in May 2015. That is seven months away. It follows that when that course ends she will not have spent in excess of five years studying at or above degree level.

11. The Respondent's case is that these facts are not what matters. I am asked to read the rule as being directed at the grant of leave rather than the actual study undertaken. So if the Appellant has now had five years of Tier 4 leave in order to study at degree level, her time is up. The plain wording of the rule suggests otherwise. It is focused on the actual study undertaken, not the terms of the student's original application, nor the grant of leave. It is to be contrasted with other rules within the 'Points Based System' which specify that it is the grant of leave that counts. See for instance paragraph 120A (as amended) which is concerned with academic progress: paragraph 120A(b)(i) provides:

> (b) For a course to represent academic progress from previous study, the course must:
>
> (i) be above the level of the previous **course for which the applicant was granted leave** as a Tier 4 (General) Student or as a Student, or

12. I therefore allow the appeal.

Decisions

13. The determination of the First-tier Tribunal contains an error of law and it is set aside.

14. I re-make the decision by allowing the appeals.

Deputy Upper Tribunal Judge Bruce
16th October 2014