



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/01608/2013

**THE IMMIGRATION ACTS**

Heard at Field House  
On 17 December 2013

Determination Promulgated  
On 08 April 2014

Before

MR C M G OCKELTON, VICE PRESIDENT  
UPPER TRIBUNAL JUDGE KOPIECZEK

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RANJAN PRASAD KOIRALA

Respondent

**Representation:**

For the Appellant: Mr P. Deller, Home Office Presenting Officer  
For the Respondent: Mr D. Bhattarai, Legal representative

**DETERMINATION AND REASONS**

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal. For convenience we refer to the respondent as the Claimant.
2. The Claimant is a citizen of Nepal, born on 13 April 1981. On 24 July 2012, within the currency of his existing leave, he applied for leave to remain as a Tier 4

(General) Student Migrant. His application was refused with reference to paragraph 245ZX(ha) of HC 395 (as amended) on the basis that his entry clearance or leave to remain exceeded (or would exceed) a period of five years study at degree level or above, a period in excess of that permitted under the Immigration Rules.

3. His appeal against that decision was allowed by First-tier Tribunal judge A.R. Williams in a decision promulgated on 11 September 2013. It was argued before Judge Williams that the Bachelor of Business Administration (“BBA”) for which the Claimant studied at Middlesex College was not at degree level within the meaning of the Immigration Rules. Thus, he was not caught by the Rule preventing degree level study for more than five years. Judge Williams concluded at [36] that paragraph 245ZX(ha), in referring to courses at degree level, must imply a course that is a recognised degree in the UK.
4. The same argument was advanced on behalf of the Claimant before us. Mr Bhattarai submitted that the BBA is not awarded by a university and so is not a degree. Mr Deller submitted that the course did not have to be “degree level study” within the meaning of paragraph 6 of the Immigration Rules.
5. Paragraph 245ZX(ha), so far as material to this appeal, provides 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 exceptions contained within that rule are not relevant to this appeal.

6. The history of the Claimant’s studies in the UK throws up some anomalies, as is apparent from the succeeding paragraphs of this determination. In reality however, the only question we have to determine in this appeal is whether the Bachelor in Business Administration Course was a course at degree level (or above) and if so, whether the Claimant thus falls foul of what may be called ‘the five year rule’. Nevertheless, for completeness and in order to put our conclusions into context, we set out the history of the Claimant’s studies on the basis of the documents before us.
7. Although in his witness statement at [2] the Claimant states that his first two years of study from 2006 were at the Academy of Professional Studies (“APS”), on the Bachelor in Business Administration Course (“BBA”), his schedule of tuition fees in the same statement refers to studies at the College of Central London. The Claimant's bundle contains letters of enrolment/acceptance on a course starting in April 2005, and then in January 2006. That starting in January 2006 was for a BTEC Higher National Diploma in Business and Marketing. We assume, in the absence of any evidence to the contrary including any certificate in relation to the course, that he did not actually undertake it, or if he did, did not complete it successfully.

8. The course at APS was for a BBA, being a three year course starting on 23 January 2006 until January 2009. In his witness statement the Claimant states at [2] that he completed the third year of the BBA course at Middlesex College. There is what is described as an enrolment certificate dated 16 May 2008 at page 9 of the bundle confirming his enrolment on the course, describing it as the Final Year under the course name, with a start date of 6 May 2008 and a completion date of 27 March 2009. There is however, an "Attendance Certificate" on page 10, from Middlesex College and dated 2 May 2008 which states under the course name as follows: "Bachelor of Business Administration (2<sup>nd</sup> Year/2<sup>nd</sup> semester)". This is at odds with the information on the enrolment certificate and inconsistent with the Claimant's witness statement which indicates that he joined Middlesex College for the third year of the BBA.
9. Again, although the Claimant says that he completed the third year of the BBA, no degree certificate has been produced. The only other document from Middlesex College is an academic transcript dated 2 May 2008 and said to represent the second semester of year 2. Mr Bhattarai accepted before us that there was no degree certificate in respect of that course.
10. Although Mr Bhattarai was not able to provide much assistance to us in relation to the inconsistencies in the evidence to which we have referred, matters are perhaps made a little clearer from a letter dated 7 July 2008 from Bhattarai & Co Immigration Practice to IND General Group Managed Migration Directorate, on the Tribunal's file, which states that the Claimant successfully completed the first year and the first semester of the second year of the course at APS but that for reasons unknown to him APS closed down. The letter continues that thereafter the Claimant joined Middlesex College in January 2008 and successfully completed the second semester of the second year of the BBA and was then in the final year at Middlesex College.
11. In his witness statement the Claimant states that after Middlesex College he studied for a Foundation Diploma in the Management of Information Systems at London Camden College. The course is actually described on the Attendance Record from London Camden College (page 11) as a Foundation Diploma and Diploma. The commencement date is given as 1 September 2008, finishing on 31 August 2009. At that time of course, according to the Enrolment Certificate from Middlesex College, he should have been undertaking the third year of study for the BBA which started on 6 May 2008 and was due to end on 27 March 2009. He was at least awarded the Foundation Diploma (page 18) which is dated 20 February 2009. There is no evidence that he was awarded the Diploma itself.
12. The Claimant next embarked on a Diploma and Advanced Diploma in Information Technology at Alexander College, starting on 10 August 2009 and finishing on 11 May 2012. The Certificates show that he completed those courses.

13. The course for which the Claimant applied for further leave to remain is a CIMA Business Accounting course at Shakespeare College, at level 7 of the National Qualifications Framework ("NQF").
14. The Foundation Diploma and advanced Diploma at London Camden College are not said on behalf of the Secretary of State to be at degree level or above. The Diploma and Advanced Diploma in Information Technology at Alexander College are said on the academic transcripts to be at levels 5 and 6, respectively of the NQF. At [21] of Judge Williams' determination he states that there is no dispute but that the [Advanced] Diploma at level 6 was at degree level.
15. It has not been disputed on behalf of the Claimant that the CIMA Business Accounting course is above degree level. It is a three year course.
16. Taking into account the level 6 course at Alexander College of 16 months' duration, it is apparent that if the BBA course is regarded as degree level or above, the Claimant's studies at degree level or above fall within the scope of paragraph 245ZX(ha) and he would not therefore, be entitled to the further leave that he seeks.
17. Paragraph 6 of the Immigration Rules defines "degree level study" as follows:
 

**"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, or levels 9 or above of the Scottish Credit and Qualifications Framework;
18. The Claimant contends simply, that because the BBA does not come within the definition of 'degree level study', and he has not otherwise 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, he does not fall foul of the 'five year rule'.
19. "Degree level study" within paragraph 6 requires it to be a "recognised United Kingdom degree". There are three reasons why in our view the BBA course does not amount to "degree level study" *within the meaning of paragraph 6*. Firstly, it was accepted on behalf of the Secretary of State before the First-tier Tribunal (see [23]) that the BBA was not so recognised. Secondly, before the First-tier Tribunal, and before us, is an e-mail from [recognised.ukdegrees@bis.gsi.gov.uk](mailto:recognised.ukdegrees@bis.gsi.gov.uk) dated 20 May 2013 which states that "The Academy of Professional Studies and Middlesex College are not on the Recognised Bodies record, nor are they on the Listed Bodies record. This means that any degree that these bodies claim to award will not be a recognised UK degree."
20. Thirdly, and significantly for the ultimate conclusion in this appeal, the phrase "degree level study" is not what appears in paragraph 245ZX(ha), which refers to the course(s) being "at degree level or above".

21. For the argument on behalf of the Claimant to succeed, he would have to persuade us that the 'five year rule' in paragraph 245ZX(ha) relates only to recognised UK degrees. In order to do that, he must establish that the phrase "at degree level or above" is to be interpreted in accordance with the definition of "degree level study" in paragraph 6.
22. We do not accept those contentions. Aside from the fact that the phrases are different, although we have considered the possibility of lax drafting in relation to paragraph 245ZX(ha) we note that the precise phrase "degree level study" as per paragraph 6 is used in several places in the Immigration Rules, for example at paragraph 118(b)(i), (ii), (iii) and 120(e) and (f) of Appendix A.
23. We consider that if it was intended that the 'five year rule' should apply only to "recognised" degree courses, such would have been specified in the rule itself. The purpose of the rule plainly has as its objective to prevent people from repeatedly undertaking higher level courses with no apparent objective other than inherent in the courses themselves.
24. Furthermore, the APS academic transcripts describe the BBA course as a degree. The title of the course "Bachelor of Business Administration" at the very least implies that it purports to be at degree level. It has not been disputed on behalf of the Claimant that he was admitted to the UK to study for a degree. Although he says in his witness statement that he realised that his previous courses were not recognised by any university or reputed examining board, even if he was labouring under a misapprehension, that does not alter the fact that he was undertaking a degree level course at APS and then Middlesex College.
25. The result is that the level 6 Advanced Diploma at Alexander College for 16 months, the two if not three years on the BBA, combined with the CIMA Business Accounting course, take the Claimant beyond the five year period set out in paragraph 245ZX(ha).
26. Accordingly, we are satisfied that the First-tier judge erred in law in concluding that the Claimant was not caught by paragraph 245ZX(ha) with respect to the BBA course. We set his decision aside and re-make it, dismissing the appeal under the Immigration Rules.
27. We do however, agree with the conclusion expressed by Judge Williams in respect of the Claimant's contention that this aspect of the Immigration Rules should not apply to him because he arrived in the UK before paragraph 245ZX(ha) was introduced. Although Mr Bhattarai attempted to revive that argument before us, as we indicated, we see no merit in it.
28. As regards Article 8 of the ECHR, it was submitted that the Claimant is in the middle of his studies on the CIMA Business Accounting course. We note from the CAS that the course is due to finish in July 2015. We take into account what the Claimant says in his witness statement about having spent over £80,000 on his

studies since his arrival. We also take into account the evidence he gave to the First-tier Tribunal in relation to his studies (see [15]).

29. Undoubtedly the Claimant has established a private life in the UK since 2006, and the Secretary of State's decision will amount to an interference with that private life.
30. Moving directly to the issue of proportionality, the other Article 8 steps being unarguable, apart from the fact of his studies there was no evidence before us in relation to his private life. Although he is likely to have spent a large sum on his education, he has qualifications which no doubt he can put to good use on his return to Nepal. Alternatively, there is no reason to suppose that he could not make an application for entry clearance for a further period of study.
31. The Claimant would have known that his status in the UK was only ever temporary. He embarked on the CIMA course knowing that his application for further leave to remain had been refused and that he might well have to leave the UK in consequence.
32. We are entirely satisfied that the decision to refuse further leave to remain is a proportionate one in the context of the legitimate aim of the economic well being of the country expressed through the maintenance of an effective immigration control.
33. Lastly, we note that the decision to refuse further leave to remain was made at the same time as a decision to remove the Claimant pursuant to section 47 of the Immigration, Asylum and Nationality Act 2006. That decision was made on 7 January 2013, before the coming into force of section 51 of the Crime and Courts Act 2013 which legitimises the simultaneous making of section 47 and variation decisions. Although the Claimant has not raised the issue of the section 47 removal decision being not in accordance with the law (following Adamally and Jaferi (section 47 removal decisions: Tribunal Procedures) [2012] UKUT 00414 (IAC)), we would not expect the Secretary of State to take steps to remove the Claimant pursuant to the original section 47 decision.

#### *Decision*

34. The decision of the First-tier Tribunal involved the making of an error on a point of law. The decision of the First-tier Tribunal is set aside and the decision re-made dismissing the appeal under the Immigration Rules and under Article 8 of the ECHR.

Upper Tribunal Judge Kopieczek

7/04/14