



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/21192/2012

THE IMMIGRATION ACTS

Heard at : Field House
On : 24 February 2014

Determination Promulgated
On : 28 February 2014

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

TANVIR HOSSAIN MOLLA

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In Person
For the Respondent: Mr G Jack, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. Mr Molla is a citizen of Bangladesh, born on 1 December 1984. Although this is the Secretary of State's appeal, it is convenient to refer to Mr Molla as the appellant.
2. The appellant's circumstances reflect those of the various appellants in the cases of Nasim and others (Raju: reasons not to follow?) [2013] UKUT 00610 ("Nasim 1") and

Nasim and others (Article 8) Pakistan [2014] UKUT 25 (“Nasim 2”), in that he secured a decision in his favour with respect to his appeal against the decision of the Secretary of State to refuse his application for leave to remain in the United Kingdom as a Tier 1 (Post-Study Work) Migrant. In the appellant’s case, his appeal before the First-tier Tribunal was successful and the Secretary of State’s appeal against that decision was dismissed by the Upper Tribunal. The Upper Tribunal’s favourable decision followed the approach of the Presidential Tribunal in Khatel and others (s85A; effect of continuing application) [2013] UKUT 00044.

3. As in the cases of the appellants in Nasim 1, following the judgment of the Court of Appeal in Secretary of State for the Home Department v Raju & Ors [2013] EWCA Civ 754, directions were issued by the Upper Tribunal proposing to set aside the determination of the Upper Tribunal pursuant to rule 45(1)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008. The appeal came before me to consider that proposal.

4. The appellant’s circumstances, as stated in the respondent’s refusal decision, are that he entered the United Kingdom on 26 September 2009 with entry clearance conferring leave to enter as a Tier 4 (General) Student until 31 March 2011 and on 4 April 2011 he was granted leave to remain on the same basis until 31 July 2012. On 4 April 2012 he applied for leave to remain as a Tier 1 (Post-Study Work) Migrant under the Points Based System. The application was refused on 24 September 2012 on the basis that he was unable to meet the requirements of Appendix A of the Immigration Rules. He was awarded zero points for the date of his award as he had failed to show that he had been awarded his eligible qualification, an MA in Marketing and Innovation from Anglia Ruskin University, no more than twelve months before the date of his application. That in turn led to the award of zero points for English language under Appendix B. His application was accordingly refused under paragraphs 245FD(c) and 245FD(d) of HC 395 and a decision was made to remove him by way of directions under section 47 of the Immigration Asylum and Nationality Act 2006.

5. The appellant’s appeal against that decision was allowed by the First-tier Tribunal in a determination promulgated on 5 February 2013 and that decision was upheld by the Upper Tribunal applying the principles in Khatel and others (s85A; effect of continuing application) [2013] UKUT 00044.

Appeal hearing and submissions

6. At the hearing the appellant was unrepresented. His response to the proposal to set aside the Upper Tribunal’s decision was that it was unfair that his close friend, the previous appellant, had now been granted leave to remain and issued with a Tier 1 (Post-Study Work) Migrant residence card in circumstances identical to his own.

7. Mr Jack relied on the decisions in Raju and Nasim in submitting that the decisions of both Tribunals had to be set aside and the appeal dismissed. Without further information it was unknown why the appellant’s friend had been granted leave, but in any event that was a matter considered by the Upper Tribunal in Nasim 1 when it found that there was

no systematic failing in the system in that regard. In the event that the section 47 decision could not now be withdrawn, Mr Jack agreed that the appeal ought to be allowed on that limited basis only.

Consideration and findings

8. The appellant's case is identical in all material respects to those of the appellants in Nasim 1 and 2, in so far as he had successfully appealed the respondent's decision to refuse his application for leave to remain, and the reasoning in Nasim 1 therefore applies to him. Following the Court of Appeal judgment in Raju, the Upper Tribunal's decision in Khatel is no longer a correct statement of the law and accordingly the decision of Upper Tribunal Judge Freeman of 10 April 2013 has to be set aside pursuant to rule 45 (1)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

9. I therefore turn to the decision of First-tier Tribunal Judge Lingam and the respondent's grounds of appeal relating to that decision. Judge Lingam plainly erred in law by concluding that the appellant was able to meet the requirements of the immigration rules and allowing the appeal on that basis. The evidence before her was that the appellant was awarded his degree by the Anglia Ruskin University on 6 July 2012. As was found by the Court of Appeal in Raju and endorsed by the Upper Tribunal in Nasim, that was the relevant date for the purposes of the rules, rather than that of an earlier letter from the college where the course was undertaken. The appellant's application for leave to remain was made on 4 April 2012 which pre-dated the date of the award and accordingly, following the principles in Raju and Nasim 1, he could not meet the requirements of the immigration rules. The judge's decision has therefore to be set aside and re-made by dismissing the appeal under the immigration rules.

10. As to the appellant's comments as to the unfairness of his friend having been granted leave in the same circumstances as his own, that is unfortunate but does not assist him in any material way. The same issue was raised before the Upper Tribunal in Nasim 1 and was addressed by the Tribunal at paragraphs 30 to 36, in which it concluded that the evidence did not indicate that the Secretary of State's decision-making was systematically inconsistent.

11. With regard to Article 8, no grounds were submitted before the First-tier Tribunal on that basis, the appellant's statement did not raise Article 8 and no evidence was adduced in regard to private life other than that relating to his studies which he had completed. No Article 8 grounds have been raised since. The appellant has been in the United Kingdom for four and a half years and has now completed the studies for which he applied for permission to reside in the country. There is no indication of any family life established here. There remains no evidence to suggest that he has established a private life capable of giving rise to a breach of Article 8 in the event of his removal from the United Kingdom. Such a finding is consistent with the observations made in Patel & Ors v Secretary of State for the Home Department [2013] UKSC 72 at paragraph 57 and in the head-note to Nasim 2. The appeal therefore also stands to be dismissed on Article 8 grounds.

12. It is the case, however, that the respondent made an unlawful decision in regard to removal under section 47 of the 2006 Act, as conceded by Mr Jack. In that respect I accordingly allow the appeal on the limited basis that the removal decision was not in accordance with the law and that the matter be remitted to the Secretary of State to make a lawful removal decision.

DECISION

13. I set aside the determination of Upper Tribunal Judge Freeman and substitute a decision on the following basis:

14. I allow the Secretary of State's appeal to the Upper Tribunal against the determination of the First-tier Tribunal by finding an error of law in that determination. I set aside the determination of the First-tier Tribunal. I re-make the decision by dismissing the appellant's appeal against the decision to refuse to vary leave but allowing it against the section 47 removal decision on the limited basis that the removal decision was not in accordance with the law.

Signed

Upper Tribunal Judge Kebede

Dated: