



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/21402/2012

THE IMMIGRATION ACTS

**Heard at Field House
On 26th February 2014**

**Determination
Promulgated
On 9th July 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

MR SUMAIR JAHANGIR

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Shah (Legal Representative)
For the Respondent: Mr P Duffy (Senior Home Office Presenting Officer)

DETERMINATION AND REASONS

Background and Procedural History

1. On 24th September 2012, the Secretary of State decided to refuse to vary the appellant's leave to remain in the United Kingdom. She also decided, on the same day, to remove him from the United Kingdom by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006 ("the section 47 removal decision").
2. Earlier that year on 2nd April 2012, during the currency of his student leave, the appellant applied for leave to remain as a Tier 1 (Post-Study Work) Migrant under the points-based system. In refusing that

application, and in making the two adverse immigration decisions, the Secretary of State found that the date of the academic award the appellant relied upon as showing that the requirements of the rules were met was 11th April 2012. This was nine days after the date of his application. She concluded that the appellant was not entitled to the points claimed under Appendix A of the Immigration Rules (“the rules”) as his application for post-study work leave was not made within twelve months of obtaining a relevant qualification and so it fell to be refused under paragraph 245FD of the rules.

3. The appellant’s appeal against the adverse decisions came before First-tier Tribunal Judge C H Bennett (“the judge”) on 14th December 2012. The judge allowed the appeal against the section 47 removal decision, finding that it was not in accordance with the law. He dismissed the appeal against the decision to refuse to vary leave and also found that the appellant’s removal in consequence would not breach the appellant’s rights under Article 8 of the Human Rights Convention.
4. The appellant applied for permission to appeal, which was granted on 12th March 2013 in the light of the decision of the Upper Tribunal in Khatel and Others [2013] UKUT 44. The Upper Tribunal then allowed the appeal against the decision to refuse to vary leave, on 3rd June 2013. There followed an application by the Secretary of State for permission to appeal to the Court of Appeal. In the same month as that application, and in the light of the judgment of the Court of Appeal in Raju [2013] EWCA Civ 754, the Upper Tribunal gave directions to the parties. Acting pursuant to rule 45(1)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008, it was proposed:
 - (a) to set aside the determination of the Upper Tribunal in the present case; and
 - (b) to substitute a fresh decision to dismiss the appellant’s appeal against the variation decision but allow the appeal against the section 47 removal decision; and
 - (c) to do so without an oral hearing.

The parties were advised that if they wished to object to any part of the proposal, they were required to do so setting out reasons.

5. On 5th August 2013, the appellant’s solicitors provided written reasons objecting to the Upper Tribunal’s proposal to set aside the previous determination. In summary, it was contended that the decision in Raju did not “imply” that supporting documents could not be submitted late in points-based scheme applications, so long as they are submitted before the Secretary of State made a decision. This was described as “the premise of evidential flexibility”, as contained in policies and paragraph 245AA of the rules. In the appellant’s case, a sequence of documents was required to be submitted but unintentionally he omitted one of the items in the sequence. It was asserted that, in any event, there were other

“much more dominant and important aspects of the present case” concerning the rules, policy guidance, fairness, human rights and errors of law. The appellant had a letter from his course provider informing him that he had successfully completed his MBA. He received a second letter, advising him that the awarding body might be unable to confirm the award and that there might be delay. The appellant in error omitted the first letter from his course provider and only sent the second one with his application for further leave. The Secretary of State took six months to make a decision but did not contact the appellant. This was unfair. Reliance was also placed on the policy guidance for the Tier 1 (Post-Study Work) scheme. This suggested that the date of award was the date on which an applicant was first notified of it by the institution at which he or she studied.

6. So far as Article 8 is concerned, the reasons containing the objection to the Upper Tribunal’s proposed course made mention of the appellant’s private and family life ties. The appellant had a legitimate expectation to “fulfil his educational and professional objectives in the UK, with established family and private life”. He was a capable student. It was asserted that the appellant had built up a private and family life that deserved respect.
7. The appeal was listed for hearing at Field House on 26th February 2014, with several similar cases. The written reasons were passed to Mr Duffy on the day and he was able to read and assimilate them.

Submissions made by the Parties on 26th February 2014

8. Mr Duffy said that the appeal against the section 47 removal decision should be allowed. Mr Shah said that he wished to adopt the written reasons and the arguments contained in them. In Khatel and Raju the claimant did not have an award when the post-study work application was made. In the appellant’s case, circumstances were different. He received notification of success in his studies from his college. Mr Shah accepted that the appellant did not have a letter from the university, the awarding body, when he made his application. He was only in possession of a letter from the institution at which he studied but the policy guidance suggested that this was sufficient. He also accepted that this point was argued in Nasim [2013] UKUT 610 and failed in that case.
9. Mr Shah said that the appellant’s Article 8 case was strong. He had private life ties here and a family life with relatives. There were grandparents here. Also in issue was fairness.
10. In response, Mr Duffy said that a letter from the awarding body was required. This was clearly set out in the rules. This could not be overlooked even if the guidance suggested otherwise. The arguments had already been put in Nasim. The appeal against the decision to refuse to vary leave should be dismissed. So far as Article 8 was concerned, the First-tier Tribunal had heard evidence. It appeared that the appellant was responsible for a cousin or a maternal uncle, while this person’s parents

were out of the country. The appellant provided some support for two or three months of the year. There was a professional carer involved. None of that rendered the appellant's removal in consequence of the decision to refuse to vary his leave disproportionate. It was clear that he was not a permanent carer.

11. Mr Shah said that the appellant had private life ties here. The maternal uncle was cross-examined before the First-tier Tribunal. It was clear that the appellant's removal would breach his Article 8 rights and he had a legitimate expectation to be allowed to remain in the United Kingdom.

Findings and Conclusions

12. Having heard the submissions made by the representatives, I conclude that the Upper Tribunal should, in the exercise of its powers under rule 45(1)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008 set aside the determination of the Upper Tribunal in the present case and substitute a fresh decision. That this is the proper course is apparent from the judgment of the Court of Appeal in Raju, overturning the determination in Khatel.
13. So far as the section 47 removal decision is concerned, the First-tier Tribunal Judge allowed the appeal. There is no mention of that aspect of the case in the determination of the Upper Tribunal in June 2013. That determination concludes with the setting aside of the judge's decision and the allowing of the appeal against the decision to refuse to vary leave. I conclude that there is no need to disturb the First-tier Tribunal Judge's decision. He properly concluded that the section 47 removal decision was not in accordance with the law.
14. So far as the appeal against the decision to refuse to vary leave is concerned, the decision to be substituted is one which dismisses the appellant's appeal. Mr Shah adopted the submissions contained in the written reasons for objecting to the Upper Tribunal's proposed course of action. I have considered them carefully but find that they have no real merit. I do not accept that the judgment in Raju does not undermine the appellant's case that he could meet the requirements of the rules by submitting documents after his application or the submission that, in any event, the documents he provided were sufficient. With respect to Mr Shah, the judgment in Raju and the guidance given in the two Nasim cases - [2014] UKUT 610 and [2014] UKUT 00025 - must be applied in the present appeal. The fundamental difficulty the appellant faces is that his application was made some nine days before he received the qualification he relied upon. He was unable to show that the qualification was obtained within a period of twelve months prior to his application. As explained in the first decision in Nasim, neither the guidance issued by the Secretary of State on the post-study work scheme in July 2010 and, subsequently, in April 2012, nor the casework instructions of 23rd May 2012 make any substantial difference. As held by Moses LJ in Raju, there is no ambiguity or lack of clarity regarding the "temporal" requirement in the fourth

section of Table 10 of Appendix A to the rules. That clear requirement was not met by the appellant.

15. Nor do arguments based on evidential flexibility advance the appellant's case. As explained in the first decision in Nasim, the Secretary of State did in fact consider the evidence of the qualification obtained by the appellant, as is clear from the letter containing the adverse decisions. She found it not to meet the requirements of the rules. As the qualification the appellant obtained was taken into account and found wanting, there was no missing information or minor error requiring correction by means of the application of evidential flexibility, whether expressed in a policy or in the rules (in paragraph 245AA). In the written submissions, it is suggested that the appellant's case concerned a sequence of documents that he was required to submit and that he unintentionally omitted one of them. It appears that this is a reference to a letter from his course provider, dated 30th March 2012. In fact, the appellant did not omit evidence of his qualification. The true position was that he simply did not have the award he required when he made his application. As such, and in the light of Raju, he could not succeed under the rules. There is no room in his case for the application of any de minimis principle and no scope or room for a "near miss".
16. Arguments based on fairness and legitimate expectation, and indeed the proportionality of refusing the application for leave to remain, were all considered by the Upper Tribunal in the two decisions in Nasim. Those arguments do not have merit in the present appeal. The appellant is not akin to those who fell within the category of Highly Skilled Migrants, who were encouraged to come to the United Kingdom on the basis of representations contained in the rules and elsewhere. He had no legitimate expectation, contrary to what is argued in the written submissions, that he would be given leave notwithstanding a failure to meet the requirements of the rules. Again, there was no ambiguity in the rules themselves. There was no obligation on the Secretary of State to inform the appellant of "the deficiency in application", as contended on the appellant's behalf. There is nothing to show any systemic inconsistency in decision making by the Secretary of State although it was argued, in some of the cases heard on 26th February 2014, that this is shown by the grant of post-study work leave to some claimants in similar circumstances to those of the appellant here. There is no evidence setting out details of other, successful applications. The appellant's application was considered by the Secretary of State and her decision to refuse to vary leave was accompanied by cogent reasons which related to the requirements of the rules. The appellant has failed to show that the decision to refuse to vary leave in his case was unlawful. The decision to be substituted is dismissal of his appeal against that decision.
17. So far as Article 8 of the Human Rights Convention is concerned, the appellant must prove the facts and matters he relies upon and the standard of proof is that of a balance of probabilities (EH (Iraq) [2005] UKAIT 00065). The appellant was given leave to enter the United Kingdom on 21st August 2009, as a student. He made his Tier 1 application in early

April 2012, before closure of that category and during the currency of his leave. He claimed to have private and family life ties here.

18. Mr Shah said that the appellant enjoyed family life with his grandparents. The First-tier Tribunal Judge's determination shows that the appellant's Article 8 case was fully put. It has not been suggested that the judge's summary is inaccurate. The appellant lived with his grandparents for about five or six months after he first arrived in the United Kingdom and has visited them regularly since then. One of his grandparents' sons has a learning disability, is unable to read and has little self-confidence. A professional carer is employed to look after him. When the appellant's grandparents are not present in the United Kingdom, he visits this relative, his maternal uncle, every day and makes decisions about his care. The judge has recorded that the appellant's grandparents are absent from the United Kingdom about once a year and for a period of two to three months on each occasion. He found that the appellant has worked part-time at McDonald's since about December 2009. The judge took into account a letter from the appellant's grandfather, a British citizen, in which it was stated that the appellant makes weekly visits. The letter also described the maternal uncle as having a learning disability and as living in a residential care home, where he receives care 24 hours a day. The home is not far from the appellant's address. The maternal uncle visits the appellant at his home twice a week.
19. Giving due weight to that evidence, it is readily apparent that the appellant's ties to the United Kingdom are relatively modest. He has been here for a relatively short period of time and with limited leave as a student. The judge found that the evidence did not show any dependency between the appellant and his relatives here and I make a similar finding. The evidence shows that the appellant provides support and care to his maternal uncle and may well be close to this relative and to his grandparents. He lives independently and although these relationships no doubt form substantial components in his private life, I find that they do not show family life ties here. Even if wrong on that, the content of any family life is very modest. There is no reason to doubt that the appellant may have formed friendships through his studies and his employment at McDonald's. There is, however, nothing to show that he would be unable to maintain those friendships from abroad, following his removal to Pakistan, as he could similarly maintain ties to his relatives here.
20. The judgment of the Supreme Court in Patel [2013] UKSC 72 is of importance, as noted in the second decision in Nasim. Opportunities for a promising student to complete a course, or for a successful student to obtain work experience, do not in themselves amount to rights which are protected under Article 8.
21. There are no particular reasons to reduce the public interest in enforcing immigration control in the appellant's case. As noted earlier, the Secretary of State gave cogent reasons for concluding that the requirements of the rules were not met. Set against the public interest, the appellant has only the modest ties he has established here. Those ties

have been established and deepened during his presence here with only limited leave. As there is nothing to show that he can meet the requirements of the rules, so as to give rise to any further leave, his immigration status is precarious. It has not been suggested that he can show that the requirements of Appendix FM or paragraph 276ADE of the rules are met.

22. As the threshold of engagement is not particularly high, I find that Article 8 is engaged, in the light of the private life ties the appellant has established here. If his relationships with his maternal uncle and grandparents amount to family life, albeit with very modest content, then Article 8 is engaged in that context too (although my primary finding is that family life has not been shown). The decision to refuse to vary leave was made in accordance with the law and in pursuit of a legitimate aim (the maintenance of immigration control in the interest of the economic wellbeing of the United Kingdom). Weighing the competing interests and taking into account my findings above, it is readily apparent that the decision to refuse to vary leave and the appellant's removal in consequence amount to a proportionate response. The appellant has not made out his grounds of appeal in relation to Article 8 of the Human Rights Convention.

Decision

23. The determination of the Upper Tribunal in the present case is set aside. A fresh decision is substituted as follows:
- (i) The appeal against the section 47 removal decision was allowed by the First-tier Tribunal Judge and that decision shall stand.
 - (ii) The appeal against the decision to refuse to vary leave is dismissed.
 - (iii) The appeal on human rights grounds, in reliance upon Article 8 of the Human Rights Convention, is dismissed.
24. There has been no application for anonymity at any stage in these proceedings and I make no direction on this occasion.

Signed

Dated

Deputy Upper Tribunal Judge R C Campbell

Fee Award

I have considered whether a fee award should be made. The appellant succeeded before the First-tier Tribunal Judge in relation to the section 47 removal decision. However, his appeal against the decision to refuse to vary leave has been dismissed and he has not succeeded in making out his human rights case. In these circumstances, I make no fee award.

Signed

Dated

Deputy Upper Tribunal Judge R C Campbell