Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/21558/2012
IA/21562/2012

THE IMMIGRATION ACTS

Heard at Sheldon Court	**Determination Promulgated**
On 4 March 2014	**On 6 March 2014**

Before

UPPER TRIBUNAL JUDGE PITT

Between

DEEPA VIGISH
VIGISH PALATHUNKAL VIJAYAN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Hussein, Syed Law Office Solicitors
For the Respondent: Mr Smart, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. For the purposes of this decision, I refer to Mrs Vigish as the appellant and to the Secretary of State for the Home Department as the respondent. The second appellant is Mrs Vigish's husband. His claim is entirely dependent on hers and for the purposes of this determination I refer only to the appeal brough by Mrs Vigish.

2. The appellant, a citizen of India, born on 15 July 1980, was granted leave to enter as a Tier 4 (General) student on 3 August 2011 until 17 May 2012.

3. On 3 April 2012 she made an application for further leave to remain in the Tier 1 (Post Study Work) category.

4. That application was refused on 26 September 2012. The material reason for the refusal was that the appellant had not been awarded an eligible qualification in the 12 months prior to the date of the application. She therefore did not meet paragraph 245FD(c) or paragraph 245FD(d) of HC 395 (the Immigration Rules).

5. The appellant's appeal against the refusal under the Immigration Rules and on Article 8 grounds was dismissed by First-tier Tribunal Judge Holt in a determination dated 3 December 2012.

6. The appellant appealed to the Upper Tribunal and, following the reported case of Khatel and others (s.85A; effect of continuing application) [2013] UKUT 00044 (IAC), in a determination dated 2 April 2013, Deputy Upper Tribunal Judge Juss found an error of law in the determination of the First-tier Tribunal, set it aside and allowed the appeal under the Immigration Rules. In simple terms, Khatel found that the "date of application" should be construed as continuing up until the date of the decision by which time it is accepted the appellant had obtained the required qualification.

7. The Court of Appeal did not agree with the ratio of Khatel, however, and overturned it in the case of Prasad Raju and others v SSHD [2013] EWCA Civ 754. Raju found that the "date of application" is simply that, the date on which the appellant applied to the respondent for further leave and the appellant must show that he obtained the required qualification in the 12 months prior to that date. As above, it is not disputed that this appellant cannot do so. Raju represents the current law on this matter, regardless of any outstanding challenge to the Supreme Court.

8. When, on 16 April 2013, the respondent applied to the Upper Tribunal for permission to appeal to the Court of Appeal, in the light of Raju, the Upper Tribunal issued a direction dated 8 July 2013 indicating that it was minded to set aside the Upper Tribunal decision allowing the appeal under rule 45 (1) (b) of The Tribunal Procedure (Upper Tribunal) Rules 2008. The direction also proposed that a fresh decision would then be substituted dismissing the appeal to the Upper Tribunal so that the First-tier Tribunal decision stood.

9. The direction invited any objections from the parties to this course of action proceeding without the need for an oral hearing. The appellant did object and so the matter came before me.

10. A further direction was issued drawing the attention of the parties to the reported case of Nasim and others (Raju; reasons not to follow?) [2013] UKUT 00610 (IAC).

Decision to Set Aside

11. The first matter I must decide is whether I can and should set aside the decision of the Upper Tribunal.

12. Section 10 of the Tribunals, Courts and Enforcement Act 2007 (TCE 2007) states:

> 10. Review of decision of Upper Tribunal
>
> (1)The Upper Tribunal may review a decision made by it on a matter in a case, other than a decision that is an excluded decision for the purposes of section 13(1) (but see subsection (7)).
>
> (2) The Upper Tribunal's power under subsection (1) in relation to a decision is exercisable—
>
> (a) of its own initiative, or
>
> (b) on application by a person who for the purposes of section 13(2) has a right of appeal in respect of the decision.
>
> …
>
> (4) Where the Upper Tribunal has under subsection (1) reviewed a decision, the Upper Tribunal may in the light of the review do any of the following—
>
> …
>
> (c) set the decision aside.
>
> (5) Where under subsection (4)(c) the Upper Tribunal sets a decision aside, the Upper Tribunal must re-decide the matter concerned.
>
> (6) Where the Upper Tribunal is acting under subsection (5), it may make such findings of fact as it considers appropriate… .

13. Section 11 of the TCE 2007 therefore allows me to review the decision of the Upper Tribunal of my own initiative. Section 11 also allows me to set aside the decision of the Upper Tribunal. When deciding whether to do so I referred to rule 45 (1) (b) of The Tribunal Procedure (Upper Tribunal) Rules 2008 which states:

> 45.—(1) On receiving an application for permission to appeal the Upper Tribunal may review the decision in accordance with rule 46 (review of a decision), but may only do so if—
> …
> (b) since the Upper Tribunal's decision, a court has made a decision which is binding on the Upper Tribunal and which, had it been made before the Upper Tribunal's decision, could have had a material effect on the decision.

14. In this case, the respondent has applied for permission to appeal the decision of the Upper Tribunal to the Court of Appeal. Raju is binding on the Upper Tribunal and, had it been made before the Upper Tribunal decision, would have had a material effect on that decision.

15. It is my conclusion that I should review the decision of Upper Tribunal and set it aside given the significant materiality of Raju. I must therefore re-make the decision on the appeal to the Upper Tribunal.

16. Mr Mahmood made a number of arguments against my taking this course of action, set out in his helpful skeleton argument and extended before me. Suffice to say that the statute set out above clearly makes the rule 45 set aside available to me regardless of Mr Mahmood's arguments on why binding and material case law should not be applied retrospectively. Nor did was it my conclusion that Mr Mahmood's submission on the legitimate expectation that Deputy Upper Tribunal Judge Juss' decision would stand were sustainable in light of the statutory provisions and materiality of Raju to this case.

Re-Making the Decision

17. In re-making the appeal I referred to the case of Nasim and others (Raju; reasons not to follow?) [2013] UKUT 00610 (IAC). The head note of that case is as follows:

> "(1) It is not legally possible for the First-tier Tribunal or the Upper Tribunal to decline to follow the judgment in Raju and others v Secretary of State for the Home Department [2013] EWCA Civ 754 on the basis that the Secretary of State's Tier 1 (Post-Study Work) policy of July 2010 (concerning the approach to be taken to "late" submission of certain educational awards) continued to apply in respect of decisions taken by the Secretary of State on or after 6 April 2012, when the Immigration Rules were changed by abolishing the Tier 1 PSW route.
>
> (2) The Secretary of State was under no duty to determine Post Study Work applications made before that date by reference to that policy, the rationale for which disappeared on 6 April. In particular:
>
> (a) a person making such an application had no vested right or legitimate expectation to have his or her application so determined;
>
> (b) it was not legally unfair of the Secretary of State to proceed as she did;
>
> (c) the de minimis principle cannot be invoked to counter the failure of applications that were unaccompanied by requisite evidence regarding the award;
>
> (d) the Secretary of State's May 2012 Casework Instruction did not gloss or modify the Immigration Rules but merely told caseworkers to apply those Rules;
>
> (e) evidential flexibility has no bearing on the matter;
>
> (f) an application was not varied by the submission of evidence of the conferring of an award on or after 6 April 2012; but even if it were, the application would fail on the basis that it would have to have been decided under the Rules in force at the date of the variation; and
>
> (g) an application under the Immigration Rules falls to be determined by reference to policies in force at the date of decision, not those in force at the date of application.
>
> (3) The date of "obtaining the relevant qualification" for the purposes of Table 10 of Appendix A to the Immigration Rules as in force immediately before 6 April 2012 is the date on which the University or other institution responsible for conferring the award

(not the institution where the applicant physically studied, if different) actually conferred that award, whether in person or in absentia.

(4) As held in Khatel and others (s85A; effect of continuing application) [2013] UKUT 00044 (IAC), section 85A of the Nationality, Immigration and Asylum Act 2002 precludes a tribunal, in a points-based appeal, from considering evidence as to compliance with points-based Rules, where that evidence was not before the Secretary of State when she took her decision; but the section does not prevent a tribunal from considering evidence that was before the Secretary of State when she took the decision, whether or not that evidence reached her only after the date of application for the purposes of paragraph 34F of the Immigration Rules."

18. The appellant has not shown that she was awarded her degree prior to the date of application. The letter dated 1 March 2012 stating she had completed her studies did not show that her degree had been awarded merely that it would be awarded at some time in the future. The appellant cannot succeed under the Immigration Rules following Raju. Any challenge brought in terms of what was argued in Nasim must also fail.

19. For these reasons, in re-making the appeal, I therefore find no error in the decision of the First-tier Tribunal which refused the appeals under the Immigration Rules.

20. First-tier Tribunal Judge Holt also refused the appeal on Article 8 grounds. There was no challenge to that aspect of the First-tier Tribunal decision before me. It therefore stands and the appellant's Article 8 claim as articulated before Judge Holt remains refused.

21. Mr Smart withdrew the outstanding s.47 removal decision in line with SSHD v Ahmadi [2013] EWCA Civ 512

Decision

22. The decision of Deputy Upper Tribunal Judge Juss dated 2 April 2013 is set aside.

23. I re-make the decision as follows:

    a. The decision of the First-tier Tribunal does not disclose an error on a point of law in the dismissal of the appeals under the Immigration Rules or Article 8 of the ECHR.

    b. The respondent's s.47 removal decision is withdrawn.

Signed  Date: 4 March 2014
Upper Tribunal Judge Pitt