



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/21575/2012

THE IMMIGRATION ACTS

Heard at Field House
On 25th February 2014

Determination Promulgated
On 11th March 2014

Before

UPPER TRIBUNAL JUDGE REEDS

Between

SAMEE UR REHMAN SHAH

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G. Saunders (Senior Presenting Officer)
For the Respondent: No appearance and no representation

DETERMINATION AND REASONS

1. Mr Samee Ur Rehman Shah is a national of Pakistan born on 1st January 1974. He was granted leave to enter the UK as a Tier 4 (General) Student on 13th May 2008 and thereafter as a Tier 4 Migrant until 30th September 2012.

2. On 4th April 2012 he applied for leave to remain in the United Kingdom as Tier 1 (Post-Study Work) Migrant but his application was refused by the Secretary of State on the 1st October 2012 under Paragraph 245FD and a decision to remove was made under Section 47 of the Immigration, Asylum and Nationality Act 2006.

3. The relevant rule, paragraph 245FD reads as follows:-

“To qualify for leave to remain as a Tier 1 (Post-Study Work) Migrant, an Applicant must meet the requirements listed below. Subject to paragraph 245FE(a)(i), if the Applicant meets these requirements, leave to remain will be granted. If the Applicant does not meet these requirements, the application will be refused.

Requirements:

- (a) The Applicant must not fall for refusal under the general grounds of refusal, and must not be an illegal entrant.
- (b) The Applicant must not previously have been granted entry clearance or leave to remain as a Tier 1 (Post-Study Work) Migrant.
- (c) The Applicant must have a minimum of 75 points under paragraph 66-72 of Appendix A.”

4. Paragraphs 66 to 72 of Appendix A were as follows:-

“ATTRIBUTES FOR TIER 1 (POST-STUDY WORK) MIGRANTS

- 66. An Applicant for entry clearance or leave to remain as a Tier 1 (Post-Study Work) Migrant must score 75 points for attributes.
- 67. Available points are shown in Table 10.
- 68. Notes to accompany the table appear below the table.

Table 10

Qualifications	Points
The Applicant has been awarded: (a) a UK recognised bachelor or postgraduate degree, or (b) a UK postgraduate certificate in education or Professional Graduate Diploma of Education, or (c) a Higher National Diploma ('HND') from a Scottish institution	20
(a) The Applicant studied for his award at a UK institution that is a UK recognised or listed body, or which holds a sponsor licence under Tier 4 of the Points Based System, or	20

<p>(b) If the Applicant is claiming points for having been awarded a Higher National diploma from a Scottish Institution, he studied for that diploma at a Scottish publicly funded institution of further or higher education, or a Scottish bona fide private education institution which maintains satisfactory records of enrolment and attendance.</p> <p>The Scottish institution must:</p> <p>(i) be on the list of Education and Training Providers list on the Department of Business, Innovation and Skills website, or</p> <p>(ii) hold a Sponsor licence under Tier 4 of the Points Based System.</p>	
<p>The Applicant's period of UK study and/or research towards his eligible award were undertaken whilst he had entry clearance, leave to enter or leave to remain in the UK that was not subject to a restriction preventing him from undertaking a course of study and/or research.</p>	20
<p>The Applicant made the application for entry clearance or leave to remain as a Tier 1 (Post-Study Work) Migrant within 12 months of obtaining the relevant qualification or within 12 months of completing a United Kingdom Foundation Programme Office affiliated Foundation Programme as a postgraduate doctor or dentist.</p>	15
<p>The Applicant is applying for leave to remain and has, or was last granted, leave as a Participant in the International Graduates Scheme (or its predecessor, the Science and engineering Graduates Scheme) or as a Participant in the Fresh Talent: Working in Scotland Scheme.</p>	75

QUALIFICATION: NOTES

69. Specified documents must be provided as evidence of the qualification and, where relevant, completion of the United Kingdom Foundation Programme Office affiliated Foundation Programme as a postgraduate doctor or dentist.
70. A qualification will have been deemed to have been 'obtained' on the date on which the Applicant was first notified in writing, by the awarding institution, that the qualification had been awarded."
5. The Secretary of State refused the appeal in a decision dated 1st October 2012. The basis for refusal for the Respondent was that he had made his application under Tier 1 on 4th April 2012 however from verifying the date of award with Liverpool John Moores University they have confirmed the date of the award was 6th September 2012. The decision cited the Upper Tribunal decision of **NO (post-study work-award needed by date of application) Nigeria [2008] UKIAT 0054** that the applicant must have been awarded the qualification at the date of the application and that the Immigration Rules state that the date of the award must be within the twelve months directly prior to the date of the application and the date of the award is after that

date. The claimed points under Appendix B English language were refused due to the failure to meet the requirement for the eligible award.

6. He exercised his right to appeal that decision and his appeal was dismissed by the First-tier Tribunal (Judge Wyman) in a determination promulgated on 27th December 2012. He set out his findings at paragraphs 18-27 that he had been awarded the LLM in international business and commercial law on 6th September 2012 but that the requirements for Tier 1 (Post-Study Work) visa required students who had already obtained their degree and would be making an application within twelve months of obtaining the relevant qualification. Thus he dismissed the appeal under the Immigration Rules and on human rights grounds (at paragraphs 28-36).
7. He did not deal with the appeal against removal decision made in respect of him, in purported pursuance of Section 47 of the Immigration, Asylum and Nationality Act 2006.
8. The Respondent sought permission to appeal the decision and permission was refused by Designated Judge Zucker on 16th January 2013. The appeal came before the Upper Tribunal (Upper Tribunal Judge Goldstein), and the Respondent secured a decision in his favour in the Upper Tribunal in respect of his appeal against the decisions of the Secretary of State to refuse to vary leave to remain in the United Kingdom, because that Tribunal followed the approach adopted by Blake J, President and Upper Tribunal Judge Coker in **Khatel and Others (s85A; effect of continuing application) [2013] UKUT 00044 (IAC)**.
9. The Secretary of State applied for permission to appeal to the Court of Appeal against the determination of the Upper Tribunal. At the time she did so, permission to appeal to the Court of Appeal had been granted by the Upper Tribunal in respect of **Khatel**. The Respondent's grounds of application reiterated the critique of **Khatel** contained in the grounds of application submitted in that case.
10. As set out in the decision of the Upper Tribunal in **Nasim and Others (Raju: reasons not to follow?) [2013] UKUT 00610 (IAC)** at paragraphs 3 – 5, 200 applications for permission to appeal to the Court of Appeal were made by the Secretary of State in respect of determinations of the Upper Tribunal, allowing appeals (or dismissing the Respondent's appeals) on the basis of **Khatel**. It appears that a significant number of applications for permission to appeal to the Upper Tribunal were made by the Secretary of State against decisions of the First-tier Tribunal, applying **Khatel**.
11. Since it was known that permission to appeal in **Khatel** had been granted (with arrangements made for the Court of Appeal to expedite the hearing in that court), it was considered appropriate to consider the Respondent's permission applications once the judgments of the Court of Appeal became known.

12. On 25th June 2013, the Court of Appeal allowed the Secretary of State's appeal against the Upper Tribunal's determinations in **Khatel** and the cases of three other immigrants: **Raju and Others v SSHD [2013] EWCA Civ 754**.
13. As a result, the Tribunal gave directions in the cases before it where the Respondent had applied for permission to appeal to the Court of Appeal. The Tribunal did so pursuant to Rule 45(1)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008:-
 - "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. The Upper Tribunal's directions indicated that it proposed, in the light of **Raju**, to review the determinations of the Upper Tribunal, set them aside and re-make the decisions in the appeals by dismissing them. The directions made plain that the Appellants would be (or continue to be) successful in their appeals against removal decisions made in respect of them, in purported pursuance of Section 47 of the Immigration, Asylum and Nationality Act 2006. This was because those decisions were unlawful (**Secretary of State for the Home Department v Ahmadi [2013] EWCA Civ 512**)..
15. Further directions were sent out by the Upper Tribunal as follows: on 21st January 2014, the Tribunal issued directions in the following terms:
 1. Any directions previously given by the Upper Tribunal in these proceedings are hereby revoked.
 2. The parties shall prepare for the forthcoming hearing in the Upper Tribunal on the basis that the issues to be considered at that hearing will be as follows:
 - (a) whether the determination of the Upper Tribunal, made by reference to the determination in **Khatel and Others (s85A; effect of continuing application) [2013] UKUT 00044 (IAC)**, should be set aside in light of the judgment of the Court of Appeal in **Raju and Others v Secretary of State for the Home Department [2013] EWCA Civ 754** (as to which, see **Nasim and Others (Raju: reasons not to follow?) [2013] UKUT 00610 (IAC)**);
 - (b) if so, whether there is an error of law in the determination of the First-tier Tribunal, such that the determination should be set aside; and
 - (c) if so, how the decision in the appeal against the immigration decisions should be re-made (see **Nasim and Others**).

3. The party who was the Appellant in the First-tier Tribunal is directed to serve on the Upper Tribunal and the Respondent, no later than seven days before the forthcoming hearing, all written submissions and written evidence (including witness statements) on the issue of Article 8 of the ECHR, upon which they will seek to rely at that hearing (where necessary, complying with Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008).
16. No further evidence or submissions were received by the Tribunal from Mr Rehman Shah.
17. Thus the appeal was listed before the Upper Tribunal. There was neither appearance nor representation on behalf of the Respondent. Notice of hearing was sent with the directions on 27th January 2014 to the address notified to the Tribunal and the address held by the Secretary of State. I am satisfied that there was good service under the Rules and pursuant to Rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) I considered that I should hear the appeals in the absence of the Respondent.
18. Mr Saunders on behalf of the Secretary of State submitted that he relied upon the grounds that had been provided and that on the basis of the decision of the Court of Appeal in **Raju and Others** taken with the most recent Upper Tribunal decision in **Nasim and Others** (1 and 2) the Appellant could not meet the Immigration Rules as the eligible date of the award was in September 2012 and that he had not been awarded the eligible award in the preceding twelve months (in accordance with the decision of **Raju**). He further submitted that the decision of the Upper Tribunal should be set aside. In respect of the decision of the First-tier Tribunal, in the conclusions reached relating to the Immigration Rules and on human rights grounds he submitted that they were open to the judge to make and should stand. However he conceded that the judge had failed to deal with the Section 47 removal point which the Secretary of State accepted was unlawful.

Conclusions:

19. I have given consideration to the evidence before me and having done so, I am satisfied that the Upper Tribunal determination promulgated on the 3rd April 2013 must be set aside for the reasons advanced by Mr Saunders, who relied upon the grounds originally submitted and supported by the Court of Appeal decision in **Raju and others** and also the Upper Tribunal decision of **Nasim and others** (cited).
20. I have considered the facts of this appeal. The documents demonstrate that the application for leave to remain was made on 4th April 2012 but his qualification was not awarded until the 6th September 2012. However, the decision in **Raju** makes it clear that **Khatel** is wrong in law. The point in **Khatel** was that it was thought that making an application was a continuing process and as long as the necessary documents were put before the Secretary of State before she made her decision the requirement of the Rules were met. However as set out in **Raju** and confirmed in the decision of **Nasim and Others** at paragraphs 20 to 21 the Immigration Rules require the applicant to have made the application for leave to remain “within twelve

months of obtaining the relevant qualification” (Appendix A, Table 10, fourth section); and that paragraph 34G of the Rules when read with the fourth section at Table 10 created a substantive requirement with which the Appellants in **Khatel** could not comply and that the fact that they had adduced evidence, prior to the date of decision that they had been notified of their awards, was of no avail.

21. 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 6th 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. In this case the confirmation of the award was on the 6th September 2012.
22. For those reasons and having carried out a review under Rule 45, I have reached the conclusion that the decision of the Upper Tribunal should be set aside .
23. I have considered the decision of the First-tier Tribunal. It is not in dispute that the Appellant was awarded an LLM in international business and commercial law on 6th September 2012 but in the light of the decision of **Raju and Others** (as cited) the Appellant cannot meet the Immigration Rules for the reasons set out in that decision and also in **Nasim and Others**. The Upper Tribunal in that case considered a number of alternative grounds; the grounds for permission to appeal the decision of the First-tier Tribunal relied on **Khatel** and **AQ Pakistan** but that does not assist the Appellant as the decision in **Raju** is clear that he cannot demonstrate that he meets the Immigration Rules for the reasons set out by the Court of Appeal. Thus the decision of the First-tier Tribunal to dismiss the appeal under paragraph 245FD of the Immigration Rules was correct in law.
24. Where the judge erred was by not dealing with the issue of the Section 47 removal in which it is acknowledged by Mr Saunders on behalf of the Secretary of State that such a decision was unlawful in light of the decision of **Ahmadi** and therefore the appeal must be allowed to the extent that it is not in accordance with the law.
25. In respect of Article 8 the judge dealt with this at paragraphs 28 to 36. He made reference to Article 8 and at paragraph 30 noted that the Appellant had not claimed that he was married, had a partner or any children therefore he found the Appellant did not have any family life in the United Kingdom. It was further accepted by the judge he may have established a private life in the United Kingdom as he had been a student. The judge noted that it was not known that if he had been working. However the judge applied the new Rules in respect of Article 8 which came into effect in July 2012. The judge noted that the Appellant could not qualify under paragraph 276ADE and Appendix FM because to qualify under the Rule he had to have lived continuously in the United Kingdom for at least twenty years and that the Appellant could not meet that requirement. He also noted that the shorter requirements for people who are aged under 18 or under 25 did not apply as the Appellant did not come within the age bracket and thus he dismissed the appeal under Article 8.

26. The Grounds of Appeal against that part of the decision are set out at paragraph 6 of the grounds. The Respondent states as follows:-

“It is further submitted that the judge did not consider the findings of the Tribunal in **CDS (PBS: “available”: Article 8) Brazil [2010] UKUT 00305 (IAC)** where the Tribunal has established the following principle.

“Nevertheless people who have been admitted on a course of study at a recognised UK institution for higher education, is likely to build up a relevant connection with the course, the institution, an educational sequence for the ultimate professional qualification sought, as well as social ties during the period of study. Cumulatively this they amount to private life that deserves respect because the person has been admitted for this purpose. The purpose remains unfilled, and discretionary factors such as misrepresentation or criminal conduct have not provided Grounds for Refusal of extension or curtailment of stay.”

The grounds go on to state that the judge has mentioned the details of the new Rules in paragraphs 33, 34 and 35 applicable to all applications in July 2012 in relation to Article 8 of the ECHR ignoring the fact that the current application was submitted on 4th April 2012. Thus the Rules could not apply. Mr Shah states “hence the applicant’s Article 8 rights is valid according to the decision of the UT in **CDS Brazil**”.

27. The grounds at paragraph 7 go on to state that the judge gave no consideration to the Appellant’s private life which would be adversely effected if asked to leave the UK stating “if asked to leave the UK at a time when the Appellant is expecting a brighter future by exploring his hidden talent to applying the knowledge gained with the result of his qualification from the UK.”
28. The First-tier Tribunal Judge was right to record that there is no claim for family life advanced on behalf of the Appellant. Further at paragraph 31 he is right to state that Mr Shah is not dependent on anyone or that anyone is dependent on him. It is further right that he accepted that he had established a private life in the United Kingdom due to having studied in the United Kingdom. It was not in dispute that the Appellant was initially granted entry clearance in 2008. However as the judge correctly notes, there was little information beyond the length of time that he had been in the United Kingdom as a student and thereafter. Whilst the judge applied the new Rules under Appendix FM and paragraph 276ADE in relation to private life, had the judge applied Article 8 principles, I am satisfied that the decision made by the Tribunal would have been the same. There is very little evidence before the Tribunal, either before the First-tier Tribunal or before this Tribunal concerning the nature of the private life asserted by the Respondent save for the length of time that he has been in the United Kingdom. His reliance on **CDS Brazil** is similarly misplaced for the reasons set out in the decision of **Nasim and Others**.
29. As noted in the decision of **Nasim and Others**, when considering the obiter remarks of the Upper Tribunal in **CDS (Brazil)**, it was noted at paragraph 40 of **Nasim and Others** that **CDS** has no material bearing as that case involved the interpretation of Immigration Rules rather than the effect of changes in such Rules. Furthermore, the

Appellant in CDS was faced with a hypothetical removal, which would have prevented her from completing the course of study for which she had been given leave.

30. In the case of this respondent he has finished his course for which leave to remain as a student related. In the present case the having finished his course seeks to undertake two years' post study work and is therefore different from the Appellants in CDS (Brazil).
31. Furthermore the Tribunal did expressly acknowledge that it was unlikely that a person would be able to show an Article 8 right by coming to the United Kingdom for temporary purposes, as this respondent has. This has also been noted in the light of the judgment in Patel and Others (see paragraph 41 of Nasim and Others).
32. I find that the judge's approach to Article 8 is consistent with that which is set out in Nasim and others (Article 8). Thus I have reached the conclusion that whilst the judge applied the new Rules, it has not been demonstrated that even if that was an error of law it would have led to any other outcome for this appeal.
33. Accordingly, for those reasons I adopt and agree with the decision of the First-tier Tribunal and do not find that there is any disproportionate interference with the respondent's Article 8 rights adopting the reasoning in Nasim and Others and therefore the appeal is to be dismissed on human rights grounds also.

Decision

The decision of the Upper Tribunal of 3rd April 2013 is set aside.

The decision of the First-tier Tribunal shall be set aside; the appeal under the Immigration Rules is dismissed and it is also dismissed on human rights grounds save that the appeal is allowed against the Section 47 removal decision on the basis that decision is not in accordance with the law.

Signed

Date

Upper Tribunal Judge Reeds