



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

Appeal Number: IA/22394/2012

THE IMMIGRATION ACTS

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

**Determination
Promulgated
On 11 July 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

**MR DHAMMIKA PRASANNA GUNASEKARA EKANAYAKE
MUDIYANSELAGE
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

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

DETERMINATION AND REASONS

Background and Procedural Matters

1. On 27 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 occasion, to remove him 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 2 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 2 May 2012, a month after his application for leave to remain. She concluded that the appellant was not entitled to the points he claimed under Appendix A of the Immigration Rules (“the rules”) as his application was not made within twelve months of obtaining the qualification and so it fell to be refused under paragraph 245FD of the rules.

3. The appellant’s appeal against the decisions came before First-tier Tribunal Judge Doran (“the judge”) on 7 January 2013. The judge allowed the appeal against the section 47 removal decision, finding that it was not in accordance with the law, in the light of Adamally and Jaferi [2012] UKUT 00414. He dismissed the appeal against the decision to refuse to vary leave. So far as Article 8 of the Human Rights Convention is concerned, the judge noted that the grounds of appeal did not advance a case on this basis and the appellant’s Counsel acknowledged that there was no real reliance placed upon the appellant’s human rights.
4. An application was made on the appellant’s behalf for permission to appeal. It was contended that the judge erred in relation to the decision to refuse to vary leave. As at the date of his application he had successfully completed his degree course and provided a letter from his course provider showing his results. It was contended that on this basis he met the requirements of the rules. Alternatively, the date of application continued up until the date of decision and the appellant had obtained the qualification by then. There was no challenge in the application to the judge’s observation that Article 8 was not relied upon.
5. Permission to appeal was granted in the light of Khatel [2013] UKUT 00044. In a brief rule 24 response from the Secretary of State, the appeal was opposed on the basis that the judge correctly identified the date of application as the relevant date of assessment. In a determination promulgated on 10 April 2013, the Upper Tribunal found that the judge was correct to find that the section 47 removal decision was unlawful. However, the judge made an error in relation to the decision to refuse to vary leave. That decision was set aside and a fresh decision, allowing the appeal under the rules, was made, again in the light of Khatel.
6. On 18 July 2013, the Upper Tribunal gave directions to the parties following the judgment of the Court of Appeal in Raju [2013] EWCA Civ 754. The Upper Tribunal, acting pursuant to rule 45(1)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008 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.

7. The appellant's solicitors (not those who had acted for him before the First-tier Tribunal) made written submissions in response, objecting to the proposal. The requirements of the rules, contained in table 10 of Appendix A, fourth section, produced an unjust result and the rules should be applied flexibly in the appellant's case. Raju could be distinguished as the letter he provided from his course provider dated 29 March 2013, with his application, showed that he had obtained the necessary qualification because he had completed his modules and obtained pass marks and results. This letter should be construed as satisfying the requirements of the rules.
8. It was also contended in the written submissions that the appellant had remained in the United Kingdom with leave throughout, wished to deploy freshly acquired skills but needed leave to do so, that the United Kingdom would benefit from the appellant's skills and the taxes he would pay and that it was in the public interest to allow his leave to be varied.

Submissions Made by the Parties on 26th February 2014 in Response to the Directions Given by the Upper Tribunal

9. Mr Lingajothy said that Raju could be distinguished from the appellant's case and the Upper Tribunal should depart from it. The appellant in Raju made his application on 4 April 2012 without evidence of his qualification. He managed to obtain it before the decision. The appellant, on the other hand, made his application on 2 April 2012 but was notified by his college on 29 March 2012 that he had been successful. His college was not the awarding body. The document appeared at page 24 of the appellant's bundle (made available to the First-tier Tribunal). The City of London College confirmed on 29 March 2012 that the appellant had been successful and now awaited "formal recording" at the university within the next few days.
10. Mr Lingajothy said that he might accept that that letter did not formally meet the requirements of the rules but the law should not be applied in too stringent a fashion as there would be a miscarriage of justice. The appellant was a student with an impeccable record who had invested money in his studies. He was told that the award would arrive. He had lost the opportunity to obtain post-study work leave and was now in limbo. This was unfair. He wished to adopt the submissions made in earlier cases heard on 26 February 2014. There had been an injustice and the appellant had a legitimate expectation that he would be given leave.
11. Mr Lingajothy called the appellant to give evidence briefly. He adopted the witness statement which appeared in his bundle, made in readiness for the First-tier Tribunal on 14 December 2012. In that statement, the appellant referred to completion of his MBA studies, as confirmed by his college on 29 March 2012. A degree was awarded to him on 2 May 2012

and he sent the certificate, which he received in June or July that year, to the Secretary of State in August 2012. In his statement, the appellant made clear that he wished to complete higher studies and work experience before commencing a career in Sri Lanka. He wished to remain in the United Kingdom as a post-study worker for two years.

12. There was no cross-examination.
13. Mr Lingajothy went on to make submissions regarding Article 8 of the Human Rights Convention. The appellant's private life included an employment and education aspect. There was a right to education enshrined in the Geneva Protocol. He wished to enhance his profile and had spent thousands of pounds on his studies. The appellant had private life ties here but no family life. He also had a legitimate expectation that he would be able to remain in the light of his calibre.
14. Mr Duffy responded to Mr Lingajothy's submissions in relation to the variation decision and Article 8. He relied upon the judgment in Raju, the decisions in Nasim, [2013] UKUT 610 and [2014] UKUT 00025 and on the judgment of the Supreme Court in Patel [2013] UKSC 72. Any right to education the appellant had did not require expression in the Human Rights Convention. If the appellant wished to study further, he had an opportunity to make a Tier 4 application. His case was on all fours with those of the appellants in Nasim. In a brief response, Mr Lingajothy said that the appellant had friends who had been given post-study work leave, in similar circumstances. Reliance was placed upon this factor in addition.

Findings and Conclusions

15. Having heard from 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 readily apparent from the judgment of the Court of Appeal in Raju, overturning the determination in Khatel.
16. The First-tier Tribunal Judge allowed the appeal against the section 47 removal decision and there has been no challenge to that finding. There is no need to disturb it. The Secretary of State had no power to make the section 47 removal decision on the same occasion as the decision to refuse to vary leave, in September 2012.
17. 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 Lingajothy submitted that the appellant's case could be distinguished from that of the appellant in Raju. With respect to him, I find that this is simply not so. The letter the appellant relied upon from his course provider, dated 29 March 2012, confirmed successful completion of modules and a dissertation but, in terms, showed that the appellant still awaited the degree itself, described as "formal recording" from the awarding body. That letter makes it perfectly clear that, as at 29

March 2012, the appellant did not have his qualification. Nor did he have it when he applied on 2 April 2012. There is no reason to doubt what appeared in his witness statement. It appears that the degree was awarded on 2 May 2012 and then sent to him in June or July (the appellant was not clear which month) before he sent it on to the Secretary of State, in August 2012. His case is not to be distinguished from Raju.

18. Mr Lingajothy adopted submissions made by other Counsel in similar cases which came before me on 26th February 2014. In those other submissions, it was suggested that the guidance given in Raju and in the two upper Tribunal decisions in Nasim should not be followed. I do not accept that the guidance should not be followed. The fundamental difficulty the appellant faces is that he could not meet the requirements of the rules, contained in the fourth section of table 10 in Appendix A. When he made his application, he could not show that he had an eligible qualification obtained within a period of twelve months prior to that application. As explained in the first decision in Nasim, neither the Secretary of State's guidance on the scheme published in July 2010 and, subsequently, in April 2012, nor the casework instruction of 23 May 2012 makes any substantial difference. In Raju, Moses LJ held that there is no ambiguity or lack of clarity regarding the "temporal" requirement in the fourth section of table 10. That clear requirement was not met by the appellant. Nor do arguments based on evidential flexibility advance the appellant's case. Again, as explained in the first decision in Nasim, the Secretary of State did consider the evidence of the qualification obtained by the appellant, as is clear from the letter containing the adverse decisions. She found that it did not meet the requirements of the rules. There was no missing information or minor error in the documentation, requiring correction by means of the application of evidential flexibility, whether expressly in a policy or in the rules, in paragraph 245AA. There is no room for the application of any de minimis principle in the appellant's case and no room for a "near miss", as has been made clear by the Court of Appeal in Raju.
19. Arguments based on fairness and legitimate expectation were considered by the Upper Tribunal in the two decisions in Nasim. Those arguments have no merit in the present appeal, to the extent that they were adopted by Mr Lingajothy. The appellant is not in a position akin to those 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 that he would be given leave notwithstanding his failure to meet the requirements of the rules. It may well be the case, as Mr Lingajothy mentioned at the very end of his submissions, that the appellant knows others who have been given post-study work leave. There is, however, no evidence before me remotely close to showing any systemic inconsistency in decision making by the Secretary of State. There was no evidence setting out details of those other successful cases. It is readily apparent that the Secretary of State's decision to refuse to vary the appellant's leave was accompanied by cogent reasons which related to the requirements of the rules. The fact that applications made by others may have succeeded, some following an

initial refusal or indeed an unsuccessful appeal, has no substantial impact on the lawfulness of the decision made in the appellant's own case.

20. So far as the decision to refuse to vary leave is concerned, the decision to be substituted is dismissal of the appellant's appeal, as he has not shown that the requirements of the rules have been met.
21. So far as the Human Rights Convention is concerned, as noted earlier in this determination, no substantial reliance was placed upon Article 8 at all when the appellant's case was argued before the First-tier Tribunal and there was no attempt to challenge the judge's observation that the appellant did not rely upon this ground in the application for permission to appeal. The grounds of appeal to the First-tier Tribunal make no mention of Article 8. In these circumstances, it is by no means clear that the appellant, through Mr Lingajothy, is now entitled to raise Article 8 in the light of Sarkar [2014] EWCA Civ 195 as the procedural history in this case strongly suggests that he has abandoned or not pursued any Article 8 claim. Even if that is not so, it is readily apparent that the evidence shows that the appellant has only the most modest private life ties here. There is very little to put in the balance against the strong public interest in the maintenance of immigration control.
22. He was given leave to enter the United Kingdom as a student on 22 July 2010. He made his Tier 1 application on 2 April 2012. The appellant has been present here for only a short period of time. His witness statement contains no detail at all of any particular friendships or associations he may have made. Mr Lingajothy mentioned employment and education as aspects of his private life and said that the appellant wanted to enhance his profile. He had a legitimate expectation that he would be able to take up employment after completing his studies.
23. Of importance in this context is the decision of the Supreme Court in Patel [2013] UKSC 72. As made clear in that judgment, opportunities for promising students to complete courses or to gain work experience, are not in themselves rights protected under Article 8. Clear guidance was given here in the second decision in Nasim, where the Upper Tribunal agreed with submissions made on the Secretary of State's behalf that Patel is a significant exhortation from the Supreme Court to refocus attention on the nature and purpose of Article 8 and, in particular, to recognise its limited utility to an individual where one has moved along the continuum, from the Article's core area of operation (meaning here family life in particular) towards what might be described as its "fuzzy penumbra". Even taking into account the funds invested by the appellant in his education and his desire, expressed in his witness statement, to remain here for two years in post-study employment, a rational assessment is that the evidence discloses only modest private life ties. The desire to pursue further opportunities in education and employment adds little. On the other hand, there are no particular reasons to reduce the clear and strong public interest in enforcing immigration control, in the interests of the economic wellbeing of the United Kingdom. Again, the appellant has been here for a short period of time, with limited leave

throughout and he has been unable to meet the requirements of the rules. There is nothing to show that any ties or friendships made here cannot be maintained from abroad, following his removal.

24. It has not been suggested by either party that the appellant can meet the requirements of the rules in Appendix FM or paragraph 276ADE. In Gulshan [2013] UKUT 00640, the Upper Tribunal held that only if there are arguably good grounds for granting leave to remain outside the rules is it necessary for an Article 8 assessment to be made, to consider whether there are compelling circumstances not sufficiently recognised under the rules. The appellant's ties here are so modest that it might reasonably be said that there are no good grounds for making such an assessment. In any event, if an assessment is made, the answer is clear in the light of the findings set out above. Accepting that Article 8 is engaged in the private life context (as the threshold of engagement is not particularly high), the decision to refuse to vary leave was made in accordance with the law and in pursuit of a legitimate aim. Weighing the competing interests, I conclude that the adverse decision and the appellant's removal in consequence amount to a proportionate response. The appellant has not made out an Article 8 case.

DECISION

25. The determination of the Upper Tribunal in the present appeal 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 and that decision shall stand.
 - (ii) The appeal against the decision to refuse to vary leave is dismissed.
 - (iii) The decision to refuse to vary leave and the appellant's removal in consequence amount to a proportionate response and do not breach his rights (or those of any other person) under Article 8 of the Human Rights Convention.

There has been no application for anonymity at any stage in these proceedings and I make no direction on this occasion.

Signed

Date

Deputy Upper Tribunal Judge R C Campbell

FEE AWARD

I have considered whether a fee award should be made. Although the appellant succeeded in relation to the section 47 removal decision, his appeal against the decision to refuse to vary leave has been dismissed and he has not succeeded in relation to his human rights. In these circumstances, I make no fee award.

Signed

Date

Deputy Upper Tribunal Judge R C Campbell

Approval for Promulgation

Name of Deputy Judge issuing approval:	Mr R C Campbell
Appellant's Name:	Mr Dhammika Prasanna Gunasekara Ekanayake Mudiyansele
Case Number:	IA/22394/2012

Oral determination (please indicate) ☐

I approve the attached Determination for promulgation

Name:

Date:

Amendments that require further action by Promulgation section:

Change of address:

Rep: ☐Appellant:

Other Information:

--