



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: IA/21794/2012  
IA/21802/2012

**THE IMMIGRATION ACTS**

Heard at Field House  
On 25<sup>th</sup> February 2014

Determination Promulgated  
On 27<sup>th</sup> February 2014

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ANITHA MORAS  
JOHNSON PRAVEEN PAULA

Respondents

**Representation:**

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

**DETERMINATION AND REASONS**

1. Mrs Anitha Moras and Mr Johnson Praveen Paula, who are husband and wife, are nationals of India born on the 7<sup>th</sup> July 1982 and 16<sup>th</sup> September 1981 respectively. The First Respondent was granted leave to enter the UK as a Tier 4 (General) student on 8<sup>th</sup> October 2009 until the 20<sup>th</sup> February 2012 and her application for leave to remain

as a Tier 2 Student was refused on the 1<sup>st</sup> September 2011. Her husband, the Second Respondent, was granted leave to enter as her dependant.

2. On the 20<sup>th</sup> February 2012 they applied for leave to remain in the United Kingdom as a Tier 1 (Post-Study) Migrant and her dependant but their applications were refused by the Secretary of State on the 21<sup>st</sup> September 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	20

<p>UK recognised or listed body, or which holds a sponsor licence under Tier 4 of the Points Based System, or</p> <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 appeals in a decision dated the 27<sup>th</sup> September 2013. The basis for refusal for the first respondent was that the 15 points claimed under Appendix A for the eligible qualification had not been provided when the application was first submitted on the 20<sup>th</sup> February 2012. Evidence of the award of the eligible qualification from the Anglia Ruskin University was not stated. The date

of the award was subsequently confirmed as the 6<sup>th</sup> July 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 12 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. The second respondent was refused on the basis of the First Respondent's claim having failed.

6. They exercised their rights to appeal the decisions and their appeals were allowed by the First-tier Tribunal (Judge Oliver) in a determination promulgated on the 5<sup>th</sup> December 2012. He set out his findings at paragraph 5 applying the decision of **AO (Pakistan) v Secretary of State [2011] EWCA Civ 833** that she had obtained her award on the 6<sup>th</sup> July 2012 and the date of the decision was the 27<sup>th</sup> September 2012 so she had her qualification at the date of the decision and that she was entitled to succeed in her appeal. He did not deal with their appeals against removal decisions made in respect of them, in purported pursuance of Section 47 of the Immigration, Asylum and Nationality Act 2006.
7. The Secretary of State sought permission to appeal the decision on the 11<sup>th</sup> December 2012 and permission was granted by Designated Judge French on the 21<sup>st</sup> December 2012. The appeals came before the Upper Tribunal (Deputy Upper Tribunal Judge Mailer), and the Respondents secured decisions in their favour in the Upper Tribunal in respect of their appeals against 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)**.
8. The Secretary of State applied for permission to appeal to the Court of Appeal against the determinations 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 Respondents' grounds of application reiterated the critique of **Khatel** contained in the grounds of application submitted in that case.
9. 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 Respondents' 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**.
10. 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 Secretary of State's permission applications once the judgments of the Court of Appeal became known.

11. On 25 June 2013, the Court of Appeal allowed the 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**.
12. 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.”
13. 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 remake 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**).
14. Further direction were sent out by the Upper Tribunal as follows: On 21 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 7 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).

15. No further evidence or submissions were received by the Tribunal.
16. Thus the appeals were listed before the Upper Tribunal. There was neither appearance nor representation on behalf of the Respondents. The court clerk provided a note for the file that stated that the First Respondent had contacted the customer services team to state that she is unwell and would not be able to attend the hearing. No medical evidence was provided in this respect. I considered the case file. An application had been made to adjourn the appeal on the 24<sup>th</sup> February 2014. Upper Tribunal Judge O'Connor had considered that application but refused it noting that:

“The application indicates that the appellant needs to ‘see’ her GP because she had ‘health issues’. She attaches a letter from her GP dated 24 February. This letter makes no mention of any medical appointment on the 25<sup>th</sup> February; indeed it refers to antibiotics having been recently prescribed. It is further relevant that the GP’s letter does not indicate that the appellant is unfit to attend before the Tribunal.”

17. Notice of hearing was sent with the directions on the 27<sup>th</sup> 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 Respondents. As noted above, the medical evidence provided with the application for an adjournment did not state that she was unfit to attend before the Tribunal and there has been no further medical evidence supplied. Furthermore, there has been no compliance with the directions sent to the Respondents.
18. Mr Saunders on behalf of the Secretary of State relied upon the grounds submitted to the Upper Tribunal in which it contended that the decision of the Upper Tribunal was wrong in law. He further relied upon the decision of **Raju** (as cited) and as upheld in **Nasim and Others** (as cited). In those circumstances he submitted the decision of the Upper Tribunal which relied upon **Khatel** disclosed an error of law and should be set aside.
19. In respect of the First-tier Tribunal’s decision, he submitted that the judge had similarly made an error of law in reaching the conclusion on the facts of the appeal that the Respondents could meet the Immigration Rules by applying **AQ (Pakistan) v SSHD [2011] EWCA Civ 830** and that by applying **Raju** to the facts of this case the First Respondent could not demonstrate that she was awarded the eligible qualification at the date of the application nor could she demonstrate that the date of the eligible award was within twelve months prior to the date of the application and thus she could not succeed under the Rules. He therefore invited the Tribunal to remake the decision dismissing the appeals under the Immigration Rules. The First-tier Tribunal had not dealt with the decision to remove under Section 47 of the 2006

Act in that respect he submitted it should be allowed only as that removal decision was unlawful.

20. As to Article 8, the Grounds of Appeal dated 8<sup>th</sup> October 2013 stated that the decision was incompatible with the ECHR but no evidence had been given. Furthermore there had been no compliance with the directions of the Tribunal that had been sent in January 2014 as to further evidence relating to Article 8. In those circumstances he submitted they could not succeed under Article 8 not only because there was a lack of evidence but also for the reasons given in **Nasim and Others**. Thus he invited the Tribunal to dismiss the appeal on human rights grounds also.
21. I reserved my determination.

### **Conclusions:**

22. I am satisfied that the determination of 4<sup>th</sup> April 2013 of Deputy Upper Tribunal Judge Maller should be set aside for the reasons advanced by Mr Saunders and supported by the Court of Appeal decision in **Raju** (as cited) also that of the Tribunal in **Nasim and Others** (as cited). There is no dispute as to the factual circumstances (see paragraph 17 of the Upper Tribunal's decision). The applications under Tier 1 were made on 20<sup>th</sup> February 2012. The evidence before the Tribunal was that the principal Respondent had submitted a confirmation letter dated 2<sup>nd</sup> April 2012 from the London Business School validated by Anglia Ruskin University stating that she had passed her modules and that the final transcript will be made available by Anglia Ruskin University on 20<sup>th</sup> July 2012. However there was also an email dated 20<sup>th</sup> September 2012 from Anglia Ruskin University confirming that the principal Respondent was awarded a Master of Arts in Marketing and Innovation on 6<sup>th</sup> July 2012. The Upper Tribunal therefore found at paragraph 17 that the notification was made to the Secretary of State after the date of the application but before the date of decision applying the decision in **Khatel** and thus the principal Respondent was entitled to succeed. 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. 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<sup>th</sup> 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 6<sup>th</sup> July 2012. For those reasons, I set aside the decision of the Upper Tribunal.

23. I am further satisfied that the decision of the First-tier Tribunal made on 5<sup>th</sup> December 2012 should similarly be set aside because it demonstrates an error of law for the same reasons as the Upper Tribunal erred in law. I have set out earlier the reference to the facts which are not in dispute. The submissions that are set out in the witness statement relate to the confirmation letter of 2<sup>nd</sup> April 2012 and also paragraph 84 of the guidance. However, as noted previously, the email from Anglia Ruskin University confirmed that the First Respondent was awarded the eligible qualification on 6<sup>th</sup> July 2012 irrespective of having passed the course as set out in the letter of 4<sup>th</sup> April 2012 and therefore applying the decisions of **Raju** and **Nasim and Others**, the principal Respondent cannot meet the Immigration Rules for the reasons outlined earlier. Her husband's appeal similarly fails as he is dependent upon hers.
24. The other grounds advanced before the First-tier Tribunal rely on matters of fairness (paragraphs 10 to 14) of the witness statement and evidential flexibility. Those arguments were similarly considered in the decision of **Nasim and Others** at paragraphs 38 to 41 and were rejected. The grounds advanced by the Respondent now are made on the basis of general fairness grounds that the Secretary of State was required to act fairly and that "that he must set up a fair system to enable the decision to be made and that he must operate the system fairly". However as the Upper Tribunal stated in **Nasim**, it was not legally unfair for the Secretary of State to proceed in the way that she did. The grounds advanced do not demonstrated that there was any unfairness on the Secretary of State's part in the way that the system was operated. As to evidential flexibility, the Tribunal for sound reasons rejected arguments concerning evidential flexibility at paragraphs 50 to 52 of their decision in **Nasim and Others**. As stated in **Raju** at (paragraph 24) "These applicants could not score 75 points because they had made their applications before they had obtained their qualifications". Therefore no application of the evidential flexibility policy could assist the Respondent on the facts of the appeal.
25. I am further satisfied that the determination of the First-tier Tribunal should be set aside as it does not make a finding on a relevant issue, namely Article 8. The Grounds of Appeal did raise the issue of Article 8 although only in the barest of terms. However the witness statement of the First Respondent did make reference to Article 8 at paragraphs 13 to 15. It set out that she had entered the UK on 20<sup>th</sup> September 2007 and had been a student living in the UK since then. At paragraph 15 it cites the decision of the Upper Tribunal in **CDS (Brazil) [2010] UKUT 305**. The First Respondent further submits that during her part-time employment and studies she had gained many friendships and therefore had established a private life.
26. With regard to that claim relying on their private life as protected by Article 8 of the ECHR, I am satisfied that the Respondents have failed to provide adequate evidence to demonstrate Article 8(1) is engaged. The evidence relied on merely indicates the time the Respondents spent in the United Kingdom as students or obtaining part-time work. The Respondents make references to friendships but there is no evidence from those people as to the significance of them. There is no reason why such friendships could not be re-established outside of the UK. Consequently I do not find that the removal of the Respondents pursuant to the decision potentially engages the operation of Article 8. In any event, even if it were engaged, I would



find that such removal proportionate to the legitimate end, namely the operation of a coherent and fair system of immigration control. As noted in the decision of **Nasim and Others**, whilst the Respondents rely on 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. In the case of the Respondent, she has finished her course for which leave to remain as a student related. In the present case the principal Respondent having finished her course seeks to undertake two years' post study work and is therefore different from the Appellants in **CDS (Brazil)**. 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 these Respondents have. The chances of such a right carrying the day have further diminished in the light of the judgment in **Khatel and Others** (see paragraph 41 of **Nasim and Others**). Accordingly, for those reasons I do not find that there is any disproportionate interference with the Respondents' Article 8 rights adopting the reasoning in **Nasim and Others** and therefore the appeals are to be dismissed on human rights grounds also.

## Decision

The determination of Deputy Upper Tribunal Judge Mailer of 4<sup>th</sup> April 2013 is set aside.

The determination of the First-tier Tribunal (Judge Oliver) involves the making of an error on a point of law and is set aside.

I remake the appeals against the immigration decision of 27<sup>th</sup> September 2012 and dismiss them on all grounds save that the appeal against the Section 47 decision under the 2006 Act is allowed on the basis that it is not in accordance with the law.

Signed

Date

Upper Tribunal Judge Reeds