



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

**Appeal Number:  
IA/49774/2013**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 27 June 2014 at 1 September 2014  
Determination promulgated**

**Before**

**Deputy Judge of the Upper Tribunal I. A. Lewis**

**Between**

**Secretary of State for the Home Department**

**Appellant**

**and**

**Hammad Anwar**

(Anonymity direction not made)

**Respondent**

**Representation**

For the Appellant: Mr. P. Nath, Home Office Presenting Officer.  
For the Respondent: Mr. I. Khan of IKON Law.

**DETERMINATION AND REASONS**

1. This is an appeal against the decision of First-tier Tribunal Judge Flynn promulgated on 10 March 2014, allowing Mr Anwar's appeal against the Secretary of State's decision dated 8 November

2013 to refuse to vary leave to remain and to remove him from the UK.

2. Although before me the Secretary of State is the appellant and Mr Anwar is the respondent, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to Mr Anwar as the Appellant and the Secretary of State as the Respondent.

### **Background**

3. The Appellant is a national of Pakistan born on 5 July 1979. The relevant chronology of his immigration history is as follows:

28 Feb 2011: The Appellant arrived in the UK with entry clearance as a Tier 4 student, valid until 13 November 2012.

2 Apr 2012: The Appellant applied for variation of leave as a Tier 1 (Post-Study Work) migrant.

25 Jan 2013: The Respondent refused the Appellant's application. The Appellant subsequently appealed to the IAC .

7 Jun 2013: Determination of First-tier Tribunal Judge Callender Smith promulgated, allowing the Appellant's appeal (ref IA/04428/2013). The appeal was essentially allowed on the basis that the Appellant's degree awarded by the University of Wales after the date of application, but before the date of the Respondent's decision, should have been considered as qualifying for points under the PBS. The appeal was allowed with reference to the case of **Khatel [2013] UKUT 00044 (IAC)** on the basis that *"the Appellant had a continuing application being considered by the Respondent and the Appellant had also been awarded a Master's degree before the date of the Respondent's decision"* (determination at paragraph 12). The appeal was *"allowed in so far as it is remitted to the*

*Secretary of State to make a valid decision against this factual background” (paragraph 13).*

2 Jul 2013: An application by the Respondent for permission to appeal to the Upper Tribunal against the decision of Judge Callender Smith was refused by First-tier Tribunal Judge Fisher. Judge Fisher observed that the application was made one day out-of-time, but was not satisfied that any special circumstances had been shown to justify extending time. As regards the substance of the challenge, it was noted to involve *“lengthy grounds tak[ing] issue with the decision in **Khatel**”*: in this context Judge Fisher observed that, notwithstanding that the Respondent had succeeded in applying for permission to appeal in **Khatel**, it remained good law which bound Judge Callender Smith. As such Judge Fisher indicated that he would not have granted permission to appeal, even if there had been justification for extending time.

8 Aug 2013: The Respondent was refused permission to appeal by Upper Tribunal Judge McKee. Judge McKee observed that Judge Fisher had been mistaken in stating that **Khatel** had not yet been overturned in circumstances where the Court of Appeal had handed down judgement on 25 June 2013 in **Raju and others [2013] EWCA Civ 754**. However, he observed that Judge Fisher had refused to admit the application because it was out of time, and that *“[t]he renewed application... does not address the timeliness point”* such that *“[t]he application must therefore be refused”*.

8 Nov 2013: The Respondent reconsidered the Appellant’s application of 2 April 2012, and refused it.

4. The decision of 8 November 2013 refusing the Appellant’s application was made for reasons set out in a combined Notice of Immigration Decision and ‘reasons for refusal’ letter of that date.

The Respondent applied the reasoning in **Raju**, and in consequence, concluded that the Appellant did not meet the requirements of paragraph 245FD(c) of the Rules. No points were awarded in respect of 'Date of obtaining the eligible award'. (In consequence no points were awarded in respect of Appendix B (English language) either.)

5. The Appellant appealed to the IAC. The First-tier Tribunal Judge allowed the Appellant's appeal for reasons set out in his determination.

6. The Respondent sought permission to appeal which was granted by First-tier Tribunal Judge Foudy on 23 April 2014.

### **Consideration: Error of Law**

7. The effect of the decision of Judge Callender Smith promulgated on 7 June 2013 was to find that the decision of the Respondent dated 25 January 2013 was not in accordance with the law, and as such remained outstanding before the Respondent and required to be re-determined in accordance with the law. In due course, on 8 November 2013, the Respondent did indeed re-determine the Appellant's application, applying the law as it then stood with reference to the case of **Raju**. In so far as the law set out in **Raju** *might* have been applicable, ('*might*', because its applicability is the issue herein), it is not suggested that the Respondent erred: what has been argued on the Appellant's behalf is that the Respondent should not have applied the law as it stood on 8 November 2013, but should have in effect re-determined the Appellant's case by reference to an earlier erroneous understanding of the law as set out in **Khatel**.

8. The Appellant's complaint was essentially this: the Respondent having failed to resolve the matter in her favour before the Tribunal made a new decision in the Appellant's case that achieved the same result as she had failed to achieve in the appellate process.

9. The First-tier Tribunal Judge directed himself to the case of **Chomanga (binding effect of unappealed decisions) Zimbabwe [2011] UKUT 00312 (IAC)** (determination at paragraph 18). He then identified that in light of the decision in **Raju** the key question was "*whether the Respondent was justified in making her decision in line with the legal position at the date of her*

*second decision*”, and in doing so observed that “*It was clearly recognised in Chomanga that a change in the legal position might justify a different outcome, contrary to a decision of the Tribunal*” (paragraph 19).

10. However, the Judge accepted the submission made on behalf of the Appellant that the change in the legal position did not justify a different outcome because the Respondent had sought permission to appeal which had been refused by both the First-tier Tribunal and the Upper Tribunal: see determination at paragraphs 20–24. In my judgement this was a material error of law: the factual difference does not justify making a legal distinction I do not agree that the Respondent’s failed attempt to launch a challenge to the decision of Judge Callender Smith has any material impact upon the fact of the subsequent clarification of the law, or justifies ignoring the principle identified by the Upper Tribunal in **Chomanga** with reference to **TB (Jamaica) [2008] EWCA Civ 997** that a decision of the Tribunal would not inevitably be binding where there had been a material change in circumstances – including a change in the law.

11. Of course this case is not strictly speaking premised on a change of law but a clarification of the law involving the overturning of previous case law. Whilst clarification of the law is not a factor expressly identified in **Chomanga** I have no hesitation in considering it analogous to the circumstances identified at paragraph 35 of **TB (Jamaica)** quoted in **Chomanga** (and helpfully reproduced at paragraph 18 of Judge Flynn’s determination).

12. Indeed in my judgement this latter aspect undermines Judge Flynn’s reliance at paragraph 23 upon the finding of Judge Callender Smith that the qualification should have been taken into account by the Respondent because it had been obtained before the date of decision. That finding was by the date of the Respondent’s decision of 8 November 2013 understood to have been legally flawed. Whilst Judge Callender Smith’s finding was consistent with the then current case law, the then current case law misstated the legal position. I do not accept that a legally flawed factual premise can provide justification for distinguishing the approach in **Chomanga** and **TB (Jamaica)**, or otherwise for effectively compelling the Respondent to make a further legally flawed decision.

13. I note that as part of his submissions in support of Judge Flynn’s determination Mr Khan argued that there had been an abuse of process – a submission also made before the First-tier Tribunal (determination at paragraph 14).

14. I profoundly disagree with the submission that the Respondent's conduct amounted to an abuse of process. In the first instance I note the observations of Lord Justice Stanley Burnton at paragraph 36 of **TB (Jamaica)**: "*That is an expression normally reserved for abuses of the process of the courts*". See further in this regard paragraph 23 of **Chomanga**.

15. In so far as the concept of abuse of process within the court system may provide analogy for considering any possible abuse of power on the part of the Executive, I note the analysis set out at paragraph 57 of **Modi [2010] EWHC 1996 (Admin)** (cited in **Chomanga** during submissions – e.g. see paragraphs 12 and 15):

*i) The bringing of a claim in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim should have been raised in the earlier proceedings if it was to be raised at all.*

*ii) It is not necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision although a collateral attack may well render second proceedings abusive.*

*iii) There will rarely be a finding of abuse unless the later proceedings involve what the court regards as unjust harassment of a party.*

*iv) It is wrong to hold simply that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive.*

*v) A broad, merits-based judgment is called for which takes account of the public and private interests involved and also takes account of all the facts of the case.*

*vi) The crucial question is whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.*

*vii) The question to ask is whether in all the circumstances a party's conduct is an abuse rather than to ask whether the conduct is an abuse and then, if it is,*

*to ask whether the abuse is excused or justified by special circumstances.”*

16. In my judgement there is nothing in the Respondent’s conduct that is remotely analogous to the behaviour identified in **Modi**. The Respondent argument – which was eventually upheld in **Raju** – was maintained throughout the earlier proceedings herein from the point of decision until the exhaustion of appeal rights by the refusal by the Upper Tribunal of permission to appeal. There is no new claim, or new approach brought to bear by the Respondent in the instant decision and proceedings. Her position has been consistent and has been vindicated by the decision in **Raju**. Any inconsistency, regrettably, has been in the decision-making of the Tribunal and Courts. It is inappropriate to characterise the Respondent’s behaviour as being tantamount to abuse of process, or amounting to an abuse of power in such circumstances.

17. Further, whilst it is unfortunate that in the earlier proceedings the Respondent failed to offer any reasons to justify extension of time in her applications to each of the First-tier Tribunal and the Upper Tribunal, I do not consider that it may be said that it was an abuse of process to seek to challenge the decision of Judge Callender Smith and fail.

18. Mr Khan acknowledged before me that if the Respondent had not attempted to challenge the decision of Judge Callender Smith, and had simply proceeded to reconsider the Appellant’s application, and had done so in reliance upon **Raju**, he would not have a case to present. His argument is premised on the Respondent’s unsuccessful attempt to overturn the decision of Judge Callender Smith as in some way estopping the Respondent from thereafter making a new decision pursuant to the remittal of the case by Judge Callender Smith in accordance with the law as it stood at the date of the making of the new decision. This is tantamount to arguing that to have tried and failed to overturn the decision of Judge Callender Smith makes the Appellant’s new decision in some way an abuse, whereas not to have tried at all and then to have applied **Raju** would not have been abusive. I reject the logic of such a submission.

19. In any event I note that Judge Flynn did not make any finding that there had been an abuse of process. Although he did accept the submission that the Respondent *“was not entitled to make a new decision again refusing the application and that doing so was an attempt to circumvent the decision of the FtTJ”* (paragraph 22), I am

satisfied for the reasons set out above that his reasons for so concluding were flawed.

20. For completeness I also note that during the course of submissions Mr Khan argued that paragraph 9 of the Respondent's grounds were "*misleading*". It seems to me that the worst that could be said about paragraph 9, is that paragraphs 20-22 of Judge Flynn's determination do not themselves expressly encompass the whole thrust of the Ground. However, the proposition contained in paragraph 9 - that the premise of Judge Flynn's decision (and indeed the premise of Mr Khan's submissions before me) was that the Respondent should ignore the law set out in **Raju** because her application for permission to appeal the decision of Judge Callender Smith was refused as being out of time - is accurate. Mr Khan gracefully withdrew his characterisation of this paragraph as 'misleading' after some discussion.

21. In all the circumstances I find that the decision of the First-tier Tribunal Judge was flawed for material error of law and I set it aside.

22. The decision in the appeal accordingly needs to be remade.

### **Re-Making the decision**

23. It was common ground between the representatives that in the event that I rejected the basis of the Appellant's case then it followed that the Respondent was correct in applying the law as set out in **Raju** to the Appellant's application. In such circumstances the Appellant could not succeed under the Rules. There being no other arguments advanced on behalf of the Appellant - and in particular Article 8 not being pursued - the only decision open to the Tribunal in remaking the appeal is to dismiss it.

24. For the avoidance of any doubt, I find that the Respondent appropriately determined the Appellant's application by reference to the law as it stood at the date of the decision, and that accordingly the Respondent's decision was in accordance with the Immigration Rules. I am unable to identify that the decision was otherwise not in accordance with the law, or was in breach of the Appellant's or anybody else's human rights. Accordingly, I remake the decision by dismissing the appeal.

### **Decision**



25. The decision of the First-tier Tribunal Judge contained a material error of law and is set aside.

26. I remake the decision in the appeal. The appeal is dismissed.

**Deputy Judge of the Upper Tribunal I. A. Lewis 30 August  
2014**