



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: IA/02957/2013  
IA/02960/2013

**THE IMMIGRATION ACTS**

Determined on the Papers at Field House  
On 7<sup>th</sup> February 2014

Determination Promulgated  
On 7<sup>th</sup> March 2014

Before

UPPER TRIBUNAL JUDGE KING TD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS DEEPTI WADHAWAN ARORA  
MR KARAN ARORA

Respondents

**DETERMINATION AND REASONS**

1. The claimants are citizens of Indian and are husband and wife.
2. The first claimant sought to remain in the United Kingdom as a Tier 1 (Post-Study Work) Migrant by an application dated 4 April 2012. This was refused by the

Secretary of State for the Home Department in a notice of refusal dated 15 January 2013.

3. She did not obtain the award of her qualification until after her application was made but before the decision.
4. The application was refused because it did not accord with the requirements of paragraph 245ZH(c). The claimants sought to appeal against that decision which appeal came before First-tier Tribunal Judge Morgan on 15 May 2013. At that time there had been a decision of the Upper Tribunal in **Khatel and Others (Section 85A; any effect of continuing application) [20123] UKUT 44 (IAC)**. It provided for the appeal to be a continuing one until the decision was made. In those circumstances the appeal was allowed under the Immigration Rules.
5. The Secretary of State for the Home Department sought to appeal against that decision on the basis that **Khatel** had been overruled in **Raju and Others [2013] EWCA Civ 754**. Thus the decision was reinstated, namely that the first claimant would fail to meet the conditions of the Immigration Rules in the circumstances of her application.
6. Leave to appeal was granted to the SSHD on that basis and the matter came before Lord Justice Bannantyne and myself on 12 September 2013.
7. Mr Khan, who then represented the claimants, accepted that the Tribunal should follow **Raju**. Nevertheless he indicated that that decision was in the process of being appealed to the Supreme Court and that permission to appeal against that decision had been granted. He said that there was little practical point in the panel deciding the appeal as an application would simply be made to stay proceedings.
8. The second issue arose concerning Article 8 of the ECHR, a matter which had not been dealt with by the First-tier Tribunal Judge. He indicated that he was in difficulties in not having the material to properly present to the Tribunal in support of that aspect of the matter.
9. Miss Kiss, who represented the SSHD on that occasion, invited us to determine the appeal without delay, but did concede that the judge's approach to Article 8 was defective in that that aspect should have been considered as part of the overall determination.
10. The panel decided that, in the interests of justice, there should be an adjournment of the appeal to be listed For Mention on the first week of January 2014.
11. Thus the matter stood as such. There has been received correspondence from Work Permits Experts who have been duly appointed and authorised to represent the claimants in the appeal. They were instructed to withdraw the appeals on an

immediate basis and a letter to that effect is in the Tribunal file dated 16<sup>th</sup> December 2013.

12. Under the terms of the Upper Tribunal (Procedure) Rules a party requires the permission of the Upper Tribunal in order to withdraw any appeal.
13. In a practical sense, however, this is not the claimants' appeal but the appeal of the Secretary of State for the Home Department. That appeal is properly before the Upper Tribunal to determine. It is not, therefore, open to the claimants to withdraw that appeal .
14. The matter had been adorned to await the outcome of any decision from the Divisional Court.
15. What I understand from the letter of 16 December 2013, seeking to withdraw the claimants' outstanding appeal, is that they no longer wish to proceed with the appeal as such before the Upper Tribunal.
16. That being the understanding which I have of the letter, it seems to me that it is in the interests of justice therefore not to allow the appeal to drift on to await the outcome in the future.
17. Given that the claimants are the respondents in this appeal by the Secretary of State for the Home Department, it is clear from the contents for the letter of withdrawal that the claimants no longer seek to contest that which is averred by the Secretary of State for the Home Department, namely that the First-tier Tribunal Judge was in error in allowing the appeal under the Immigration Rules given the decision in **Raju and Others**.
18. The claimants having made their position clear in that letter, it seems to me that no useful purpose is to be served by calling the parties together for the purposes of an oral hearing. It is clear that the claimants wish to play no further part in the proceedings and to terminate such participation in the appeal process as may be the case. In those circumstances I shall proceed to deal with the appeal forthwith upon the papers.
19. In respect of the finding by the First-tier Tribunal Judge that the award of the qualification after application but before decision was properly to be considered under the Rules that position has now been reversed by the decision in **Raju and Others**.
20. Accordingly I find, therefore, that the decision of the First-tier Tribunal Judge was in error and that that decision should be set aside to be remade.
21. I proceed therefore to remake the decision in accordance with the most recent jurisprudence of the Divisional Court, namely that of **Raju and Others** and find

therefore that it is plain that the claimants, in particular the first claimant, did not meet the conditions of the Immigration Rules and therefore it follows that the claimants' appeal in respect of that matter is to be dismissed.

22. It is clear that the First-tier Tribunal Judge failed to consider Article 8 of the ECHR and that is a material error as conceded by Miss Kiss on behalf of the Secretary of State for the Home Department. Therefore that aspect of the decision is also to be set aside to be remade.
23. I commented to Mr Khan who represented the claimants at the hearing of 12 September 2013 that there was a paucity of evidence upon which the basis of Article 8 could be fairly decided. That was one of the reasons for the adjournment in order to obtain that such further evidence. None has been presented before me.
24. I bear in mind what has been said in the decision of **MF (Nigeria) [2013] EWCA Civ 1192**, in particular the relationship between Article 8 of the ECHR and the Immigration Rules themselves.
25. The Tribunal in **MF** held that the new Rules were themselves a complete code and that the exceptional circumstances to be considered in the balancing exercise involved the application of a proportionality test as required by the Strasbourg jurisprudence.
26. In no sense seeking to import the exceptionality test, it was recognised within the jurisprudence that if somebody fails to meet the Immigration Rules it will be in very rare situations that they would succeed under Article 8 of the ECHR. In this case there is a paucity of material for me to consider that any of the claimants' fundamental human rights have been breached by the decision that has been made.
27. Indeed as a matter of practicality it is to be noted that although the application for leave to remain was refused no removal directions were set. Thus until such directions are made it would be for the claimants to return to India voluntarily. The alternative is for them to wait until any removal decision is made which of itself would enable them not raise any matters pertaining to their human rights by way of appeal.
28. In all the circumstances, therefore, the appeal by the Secretary of State for the Home Department is allowed. The decision of the First-tier Tribunal is set aside. In respect of the immigration decision the claimants' appeal is dismissed. In respect of any appeal relating to Article 8 of the ECHR as made by the claimants that also is dismissed

Signed

Date 05/03/2014

Upper Tribunal Judge King TD