Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/21199/2012
IA/21200/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 25th February 2014	**On 26th February 2014**
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Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DHARMISTHABEN KARTIKKUMAR PANDYA – FIRST RESPONDENT
KARTIKKUMAR BHARATBHAI PANDYA – SECOND RESPONDENT

Respondents

Representation:

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

DETERMINATION AND REASONS

1. Mrs Dharmisthaben Kartikkumar Pandya and Mr Kartikkumar Bharatbhai Pandya, who are husband and wife, are nationals of India born on the 8th February 1977 and 27th March 1977 respectively. The first Respondent was granted leave to enter the

UK as a Tier 4 (General) Student on the 15th May 2010 until the 22nd November 2011 and was granted further leave to remain as a Tier 4 Student until 31st May 2012. Her husband, the second Respondent, was granted leave to enter as her dependant.

2. On the 4th April 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 21st September 2012 under Paragraph 245FD.

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.
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> 67. Available points are shown in Table 10.
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> 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	20

under Tier 4 of the Points Based System, or (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. The Scottish institution must: (i) be on the list of Education and Training Providers list on the Department of Business, Innovation and Skills website, or (ii) hold a Sponsor licence under Tier 4 of the Points Based System.	
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.	20
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.	15
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.	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 21st September 2012. 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 4th April 2012. Evidence of the award of the eligible qualification, a Masters of Business Administration, had been provided on 21st June 2012. 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 Fisher) in a determination promulgated on the 12th December 2012. He set out his findings at paragraphs 6-7 applying the decision of **AQ (Pakistan) v Secretary of State [2011] EWCA Civ 833** that she had obtained her award on 21st June 2012 and the date of the decision was 21st September 2012 so she had her qualification at the date of the decision and that she was entitled to succeed in her appeal. He further dealt 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. He allowed the appeals on the basis that the decisions were unlawful applying **Ahmadi [2012] UKUT 000147**.

7. The Secretary of State sought permission to appeal the decision on 15th December 2012 and permission was granted by Designated Judge Peart on 4th January 2013. The appeals came before an Upper Tribunal panel (Upper Tribunal Judge Taylor and Deputy Judge Davey), 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 Respondent 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 Respondent's 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 Respondent 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 Respondent 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 Respondent's permission applications once the judgments of the Court of Appeal became known.

11. On 25 June 2013, the Court of Appeal allowed the Respondent'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**. 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."

12. 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**).

13. In an undated letter date stamped 7th August 2013, the Respondents requested an oral hearing and submitted they should still be entitled to succeed in their appeals against the decisions to refuse to vary leave, notwithstanding the judgment in **Raju**.

14. Further directions 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.
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> 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:
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> (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
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> (c) if so, how the decision in the appeal against the immigration decisions should be re-made (see **Nasim and Others**).
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> 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)."

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. Notice of hearing was sent with the directions on the 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 respondents.

17. Mr Saunders submitted that for the reasons set out in the grounds that the decision of the Upper Tribunal should be set aside. The facts were not in dispute namely that the respondents had made their applications on 4th April 2012 however the date of the eligible award was not until 21st June 2012 and therefore the principal respondent could not succeed under the Immigration Rules relying on the decisions of the Court of Appeal in **Raju** (as cited) and as subsequently explained and upheld in the decision of the Tribunal in **Nasim and Others** (as cited). Therefore he invited the Tribunal to set aside the determination of the Upper Tribunal. In respect of the First-tier Tribunal's decision he submitted that that similarly was wrong in law and invited the Tribunal to set aside that decision and re-make it by dismissing the appeal save that the decision relating to Section 47 removal decision should remain. In respect of Article 8, he submitted that whilst the judge did not deal with this because he had allowed the appeal, there had been no evidence before the Tribunal in which the appeals could be allowed under Article 8. Furthermore there had been be no compliance with the directions sent to the parties and there had been no evidence or any further evidence relating to Article 8 grounds and therefore that should also be dismissed.

18. I reserved my determination which I now give.

19. Having considered the evidence and reviewed the determination, I am satisfied that the Upper Tribunal determination of 17th April 2013 should be set aside in the light of the judgment of the Court of Appeal in **Raju and Others** and the decision of the Tribunal in **Nasim and Others** (as cited). In doing so I have considered the written submissions made on behalf of the Respondents. The first ground relates to what has been described as "inconsistent decision making" noting that they are aware that "many people who have applied for the grant of status in a similar manner" have been allowed. It is submitted that there is no consistent line of factual decisions and therefore "I request the Secretary of State to reconsider this case."

20. The challenge on the basis of "inconsistent decision making" was dealt with by the Upper Tribunal in the decision of **Nasim and Others (Article 8) [2014] UKUT 0025 (IAC)** at paragraphs 30-36. As noted at paragraph 32, the Tribunal considered that the Appellants had not begun to make out their case in respect of inconsistent decision making and at paragraph 34 found that the evidence did not demonstrate a

systemic inconsistency in relevant decision making by the Respondent. Whilst that was in the context of Article 8, the decision of the Upper Tribunal in **Nasim** applies to the arguments advanced by these Respondents. There is no evidence provided with the grounds to come anywhere near to demonstrating that there was any systemic inconsistency in the relevant decision making by the Respondent. Whilst the Respondent refers to being aware of "many people" who have applied there is no evidence of those applications or the basis upon which they were either refused or granted. For the reasons set out in **Nasim**, that argument must fail.

21. The second argument raised is that the decision of the Upper Tribunal was a "fair" decision and had followed the case of **Thakur [2011] UKUT 151 (IAC).** Contrary to the submission made by the Respondent, neither the Upper Tribunal nor the First-tier Tribunal allowed the appeals on the basis of any fairness arguments. It is plain from the determinations that the Upper Tribunal had applied the decision of **Khatel**, which is found to be wrong in law and the First-tier Tribunal was similarly flawed in law by its reliance upon the decision of **AQ**. Any grounds advanced on fairness have been dealt with in the decision of **Nasim**. That cannot be advanced on behalf of the Respondents. The last point made is that by starting and enrolling on the course they had a "legitimate expectation" to receive the grant of a Tier 1 (Post-Study Work) status upon the completion of the studies. That was an argument also advanced before the Upper Tribunal in **Nasim and Others** at paragraphs 31-37. Those arguments were roundly rejected by the Tribunal and nothing advanced by the Respondents for this appeal changes the decision in **Nasim**. Thus I am satisfied that the decision of the Upper Tribunal was wrong in law because the first Respondent could not satisfy the requirements of the Rules because she could not show that she had obtained her eligible award within twelve months of last being given leave; the application having been made on 4th April 2012 but the eligible qualification not being awarded until 21st June 2012. I therefore set aside the decision of the Upper Tribunal.

22. The decision of the First-tier Tribunal (Judge Fisher) also erred in law for the same reasons as the Upper Tribunal when applying the decision of **Raju** and **Nasim and Others**. In respect of the decision of removal under Section 47, it is common ground that that part of the decision was correctly made and should stand.

23. The determination of the First-tier Tribunal did not deal with Article 8. Whilst the Grounds of Appeal against the decision of the Secretary of State filed on 3rd October 2012 states "The Secretary of State failed to have regard to the Appellants' unique circumstances and removal is contrary to the ECHR" there was no evidence of their circumstances given in respect of any such claim. Furthermore there has been no compliance with the directions sent by the Upper Tribunal relating to any evidence relevant to re-making the decision on Article 8 grounds. For the reasons set out in **Nasim and Others**, I do not find on the evidence that removal of the Respondents, would potentially engage the operation of Article 8. Both parties entered the United Kingdom in 2010; the first Respondent as a student and her husband as her dependant. They were subsequently granted further periods of leave to remain in that capacity. Whilst the Grounds of Appeal contend that they had established a private life due to "unique circumstances" that has not been supported by any form of

evidence. The recent letter makes no reference to Article 8 grounds or any evidence relied upon. The first Respondent has been in the United Kingdom for the purpose of studying and those studies for which she was granted leave to enter and to remain are now completed. It is likely that both will have established friendships but even if Article 8 was engaged, removal would be proportionate to the legitimate public end, namely the operation of a coherent and fair system of immigration control under those circumstances their appeals on human rights grounds are accordingly dismissed.

Decision

The decision of the Upper Tribunal is set aside. The decision of the First-tier Tribunal is set aside and re-made as follows:-

Both appeals are dismissed under the Immigration Rules and on human rights grounds but the appeal against the removal direction under Section 47 is allowed only.

Signed Date

Upper Tribunal Judge Reeds