Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/21716/2012

THE IMMIGRATION ACTS

Heard at Sheldon Court	**Determination Promulgated**
On 4 March 2014	**On 6 March 2014**

Before

UPPER TRIBUNAL JUDGE PITT

Between

GIRISH BORA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Mahmood, S.Z. Solicitors
For the Respondent: Mr Smart, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. For the purposes of this decision, I refer to Mr Bora as the appellant and to the Secretary of State for the Home Department as the respondent.

2. The appellant, a citizen of India, born on 26 November 1987, was granted leave to enter as a Tier 4 (General) student on 22 January 2011 until 30 July 2012.

3. On 5 April 2012 he made an application for further leave to remain in the Tier 1 (Post Study Work) category.

4. That application was refused on 27 September 2012. The material reason for the refusal was that the appellant had not been awarded an eligible qualification in the 12 months prior to the date of the application. He therefore did not meet paragraph 245FD(c) or paragraph 245FD(d) of HC 395 (the Immigration Rules).

5. The appellant's appeal under the Immigration Rules was allowed by First-tier Tribunal Judge Kharwar in a determination promulgated on 11 December 2012.

6. The respondent appealed to the Upper Tribunal but, following the reported case of Khatel and others (s.85A; effect of continuing application) [2013] UKUT 00044 (IAC), in a determination dated 25 February 2013, Deputy Upper Tribunal Judge Pickup found no error of law in the determination of the First-tier Tribunal. In simple terms, Khatel found that the "date of application" should be construed as continuing up until the date of the decision by which time it is accepted the appellant had obtained the required qualification.

7. The Court of Appeal did not agree with the ratio of Khatel, however, and overturned it in the case of Prasad Raju and others v SSHD [2013] EWCA Civ 754. Raju found that the "date of application" is simply that, the date on which the appellant applied to the respondent for further leave and the appellant must show that he obtained the required qualification in the 12 months prior to that date. As above, it is not disputed that this appellant cannot do so. Raju represents the current law on this matter, regardless of any outstanding challenge to the Supreme Court.

8. When, on 2 March 2013, the respondent applied to the Upper Tribunal for permission to appeal to the Court of Appeal, in the light of Raju, the Upper Tribunal issued a direction dated 8 July 2013 indicating that it was minded to set aside the Upper Tribunal decision under rule 45 (1) (b) of The Tribunal Procedure (Upper Tribunal) Rules 2008. The direction also proposed that a fresh decision would then be substituted finding an error of law in the First-tier Tribunal decision and dismissing the appeal under the Immigration Rules.

9. The direction invited any objections from the parties to this course of action proceeding without the need for an oral hearing. The appellant did object and so the matter came before me.

10. A further direction was issued drawing the attention of the parties to the reported case of Nasim and others (Raju; reasons not to follow?) [2013] UKUT 00610 (IAC).

Decision to Set Aside

11. The first matter I must decide is whether I can and should set aside the decision of the Upper Tribunal.

12. Section 10 of the Tribunals, Courts and Enforcement Act 2007 (TCE 2007) states:

> 10. Review of decision of Upper Tribunal
>
> (1)The Upper Tribunal may review a decision made by it on a matter in a case, other than a decision that is an excluded decision for the purposes of section 13(1) (but see subsection (7)).
>
> (2) The Upper Tribunal's power under subsection (1) in relation to a decision is exercisable—
>
> (a) of its own initiative, or
>
> (b) on application by a person who for the purposes of section 13(2) has a right of appeal in respect of the decision.
>
> …
>
> (4) Where the Upper Tribunal has under subsection (1) reviewed a decision, the Upper Tribunal may in the light of the review do any of the following—
>
> …
>
> (c) set the decision aside.
>
> (5) Where under subsection (4)(c) the Upper Tribunal sets a decision aside, the Upper Tribunal must re-decide the matter concerned.
>
> (6) Where the Upper Tribunal is acting under subsection (5), it may make such findings of fact as it considers appropriate… .

13. Section 11 of the TCE 2007 therefore allows me to review the decision of the Upper Tribunal of my own initiative. Section 11 also allows me to set aside the decision of the Upper Tribunal. When deciding whether to do so I referred to rule 45 (1) (b) of The Tribunal Procedure (Upper Tribunal) Rules 2008 which states:

> 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.

14. In this case, the respondent has applied for permission to appeal the decision of the Upper Tribunal to the Court of Appeal. Raju is binding on the Upper Tribunal and, had it been made before the Upper Tribunal decision, would have had a material effect on that decision.

15. It is my conclusion that I should review the decision of Upper Tribunal and set it aside given the significant materiality of Raju. I must therefore re-make the decision on the appeal to the Upper Tribunal.

Re-Making the Decision

16. In re-making the appeal I referred to the case of Nasim and others (Raju; reasons not to follow?) [2013] UKUT 00610 (IAC). The head note of that case is as follows:

> "(1) It is not legally possible for the First-tier Tribunal or the Upper Tribunal to decline to follow the judgment in Raju and others v Secretary of State for the Home Department [2013] EWCA Civ 754 on the basis that the Secretary of State's Tier 1 (Post-Study Work) policy of July 2010 (concerning the approach to be taken to "late" submission of certain educational awards) continued to apply in respect of decisions taken by the Secretary of State on or after 6 April 2012, when the Immigration Rules were changed by abolishing the Tier 1 PSW route.
>
> (2) The Secretary of State was under no duty to determine Post Study Work applications made before that date by reference to that policy, the rationale for which disappeared on 6 April. In particular:
>
> (a) a person making such an application had no vested right or legitimate expectation to have his or her application so determined;
>
> (b) it was not legally unfair of the Secretary of State to proceed as she did;
>
> (c) the de minimis principle cannot be invoked to counter the failure of applications that were unaccompanied by requisite evidence regarding the award;
>
> (d) the Secretary of State's May 2012 Casework Instruction did not gloss or modify the Immigration Rules but merely told caseworkers to apply those Rules;
>
> (e) evidential flexibility has no bearing on the matter;
>
> (f) an application was not varied by the submission of evidence of the conferring of an award on or after 6 April 2012; but even if it were, the application would fail on the basis that it would have to have been decided under the Rules in force at the date of the variation; and
>
> (g) an application under the Immigration Rules falls to be determined by reference to policies in force at the date of decision, not those in force at the date of application.
>
> (3) 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 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.
>
> (4) As held in Khatel and others (s85A; effect of continuing application) [2013] UKUT 00044 (IAC), section 85A of the Nationality, Immigration and Asylum Act 2002 precludes a tribunal, in a points-based appeal, from considering evidence as to compliance with points-based Rules, where that evidence was not before the Secretary of State when she took her decision; but the section does not prevent a tribunal from considering evidence that was before the Secretary of State when she took the decision, whether or not that evidence reached her only after the date of application for the purposes of paragraph 34F of the Immigration Rules."

17. Firstly, I find that the First-tier Tribunal made an error on a point of law in allowing the appeal under the Immigration Rules. Following Raju, the appellant had not obtained his educational qualification as of the date of application. Mr Mahmood argued that a letter from the appellant's university dated 2 April 2012 should be taken as an award of the appellant's degree. I did not accept that could be so. The letter is not expressed in terms of the degree having been awarded. A further letter dated 20 June 2012 from the university states that the degree was awarded on 12 June 2012. The appellant argued that he was not required to provide the degree itself, merely a letter showing that he had completed all the requirements for the degree and would be awarded the degree. His arguments in that regard are addressed fully in Nasim; by the date of the decision the respondent's policy guidance required the degree to have been awarded as of the date of the application and that is the policy relevant to the application made here.

18. For the same reasons, having found an error on a point of law such that the determination of the First-tier Tribunal had to be set aside, when re-making the decision, I dismissed it under the Immigration Rules.

Article 8

19. The First-tier Tribunal did not deal with the ground of appeal before it concerning Article 8 of the ECHR. That omission has never been a ground of appeal against the First-tier Tribunal to the Upper Tribunal at any point, however. There was no application to me for the grounds of appeal to be varied. Even if such a challenge had been made, it is not my view that an Article 8 claim had any prospect of success where the appellant came to the UK to obtain an education qualification, has obtained it, cannot now meet the Immigration Rules for further leave, was given proper notice of the changes to the Post Study Work category and given the comments of the Supreme Court in Patel and Others v SSHD [2013] UKSC 72 which express the limited utility of Article 8 to an appellant such as this where physical and moral integrity are not in issue; see also Nasim and others (Article 8) [2014] UKUT 00025 (IAC).

Section 47

20. Mr Smart withdrew the respondent's decision under s.47 of the Immigration, Asylum and Nationality Act 2006 in line with SSHD v Ahmadi [2013] EWCA Civ 512.

Decision

21. The decision of Deputy Upper Tribunal Judge Pickup dated 25 February 2013 is set aside.

22. I find an error of law in the determination of First-tier Tribunal and set it aside to be re-made.

23. I re-make the appeal as follows:

a. The appeal under the Immigration Rules is dismissed.

b. The section 47 decision is withdrawn by the respondent.

Fee Award Note: this is **not** part of the determination.

In the light of my decision to re-make the decision in the appeal by refusing it, I make no fee award.

Signed Date: 4 March 2014
Upper Tribunal Judge Pitt