Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/21833/2012

THE IMMIGRATION ACTS

Heard at Taylor House	**Determination Promulgated**
On 26th February 2014	**On 6th June 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

MR MUHAMMAD SARFRAZ ASLAM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Karim (Counsel)
For the Respondent: Mr P Duffy (Home Office Presenting Officer)

DETERMINATION AND REASONS

Background and Procedural History

1. On 24th September 2012, the Secretary of State decided to refuse to vary the appellant's leave to remain in the United Kingdom. She also decided, on the same occasion, to remove him by way of directions under section

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47 of the Immigration, Asylum and Nationality Act 2006 ("the section 47 removal decision").

2. Earlier that year, on 21st February 2012, during the currency of his student leave, the appellant applied for leave to remain as a Tier 1 (Post-Study Work) Migrant under the points-based system. In refusing that application, and in making the two adverse immigration decisions, the Secretary of State found that the date of the academic award the appellant relied upon as showing that the requirements of the rules were met was 11th June 2012, a little under four months after his application for leave to remain. She concluded that the appellant was not entitled to the points claimed under Appendix A of the Immigration Rules ("the rules") as his application was not made within twelve months of obtaining the relevant qualification and so it fell to be refused under paragraph 245FD of the rules.

3. The appellant's appeal against the adverse decisions was dismissed by First-tier Tribunal Judge McIntosh ("the judge") in a determination promulgated on 3rd January 2013. The judge found that the requirements of the rules were not met. So far as Article 8 of the Human Rights Convention is concerned, he found that the appellant had established a private life in the United Kingdom but concluded that the decision to remove him was a proportionate response.

4. Permission to appeal was granted, in the light of the decision in Khatel [2013] UKUT 00044. The Upper Tribunal then allowed the appeal in a determination promulgated on 20th May 2013, having first found that the decision of the First-tier Tribunal contained an error of law such that it fell to be set aside. In allowing the appeal, the Upper Tribunal found that the only issue requiring determination was the lawfulness of the decision to refuse to vary leave and there was no separate consideration of the section 47 removal decision.

5. The Secretary of State applied for permission to appeal to the Court of Appeal. Shortly afterwards, and following the judgment of the Court of Appeal in Raju [2013] EWCA Civ 754, the Upper Tribunal gave directions to the parties. In the light of that judgment, which overturned Khatel, the Upper Tribunal, acting pursuant to rule 45(1)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008 proposed:

(a) to set aside the determination of the Upper Tribunal in the present case; and

(b) to substitute a fresh decision to dismiss the appellant's appeal against the variation decision but allow the appeal against the section 47 removal decision; and

(c) to do so without an oral hearing.

The parties were advised that if they wished to object to any part of the proposal, they were required to do so, setting out reasons.

6. Following an objection, a hearing was listed before me on 26th February 2014. On 2nd August 2013, submissions were made on the appellant's behalf by his solicitors. This letter was passed to Mr Duffy, who was able to read and assimilate the contents.

The Submissions Made by the Parties in Response to the Upper Tribunal Directions

7. At the outset, Mr Duffy indicated that the Secretary of State would not oppose the appeal being allowed against the section 47 removal decision. That decision was made on the same occasion as the decision to refuse to vary leave, on 24th September 2012, long before 8th May 2013 (when section 51 of the Crime and Courts Act 2013 came into effect).

8. Mr Karim said that reliance was placed upon the letter from the appellant's solicitors dated 2nd August 2013. In that letter, it was contended on the appellant's behalf that his appeal against the decision to refuse to vary leave ought to be allowed. Mr Karim also adopted the submissions made by in the first case heard in the list, the appeal of Mr M Ramzan, IA/21916/2012. In brief summary, those submissions were that the Court of Appeal in Raju did not give sufficient weight to Home Office guidance on the post-study work scheme or to the application form required to be completed by claimants, or to the award of 20 points in the present appeal and others for the qualifications obtained. The submissions also included reliance upon evidential flexibility and the de minimis rule and a submission that the two decisions of the Upper Tribunal in Nasim and Others [2013] UKUT 610 and [2014] UKUT 00025 did not provide a complete answer to the appellant's case. Overall, the Upper Tribunal came to the correct decision in allowing the present appeal in the light of the case law at the time. Moreover, the Secretary of State had decided applications inconsistently, with some in the same position as the appellant being granted leave and others not.

9. Mr Karim said that a submission would be made on behalf of the appellant that the decisions in Nasim were not binding on the Upper Tribunal. They were persuasive. Of importance was the inconsistent treatment by the Secretary of State. If the law had been clearer and if the post-study work scheme had not been so complicated, the appellant might have chosen to make a different sort of application. There had been a great deal of confusion and chaos but this was not the doing of the appellant. He was disadvantaged, having invested funds and having incurred costs. He was deprived of an opportunity to make another application and two years of his life had been wasted.

10. So far as Article 8 was concerned, the appellant had established private life ties in the United Kingdom but he had no family life here. He arrived with student leave as long ago as September 2009.

11. Mr Duffy said that there was no good reason to depart from the guidance given in the two Nasim cases. The appellant might have found himself in an unfortunate position but this was so of the appellants in those other cases. The appellant was really in no different a position and it appeared that he was relying on the same arguments put by the appellants in Nasim and Others. Moreover, he could still make another application if he wished, even though he might not have the benefit of a right of appeal should the application fail. As yet, no lawful removal decision had been made in his case. So far as Article 8 was concerned, the guidance given in Nasim and Others should be followed, as should the guidance given by the Supreme Court in Patel [2013] UKSC 72.

12. Mr Karim made a brief response. Although the appellant might still be able to make an application, he could not benefit from the concessions that might have been available to him. For example, he would be unable to rely upon "established status" as a student. His options were limited.

Findings and Conclusions

13. Having heard from the parties, I conclude that the Upper Tribunal should, in the exercise of its powers under rule 45(1)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008 set aside the determination of the Upper Tribunal in the present case and substitute a fresh decision. That this is the proper course is apparent from the judgment of the Court of Appeal in Raju, overturning the determination in Khatel.

14. The decision substituted in relation to the section 47 removal decision is simply to allow the appeal against it. On the date it was made, on 24th September 2012, the Secretary of State had no power to make such a removal decision on the same occasion as a decision to refuse to vary leave.

15. So far as the appeal against the decision to refuse to vary leave is concerned, the decision to be substituted is one which dismisses the appellant's appeal. Mr Karim made careful submissions on the appellant's behalf and suggested that although the two decisions in Nasim and Others were persuasive, they should not be followed. With great respect to him, I find that the judgment in Raju and the guidance given in the two Nasim and Others cases ought to be applied as there is no sensible reason to do otherwise. The fundamental difficulty the appellant faces is that his application was made on 21st February 2012 but the qualification relied upon, required to have been obtained within the period of twelve months prior to that application, was awarded only on 11th June 2012. As explained in the first decision in Nasim and Others, neither the guidance issued by the Secretary of State on the scheme in July 2010 and,

subsequently, in April 2012, nor the case work instruction of 23rd May 2012 (which was not expressly relied upon in the present appeal) make any substantial difference. The Upper Tribunal in the first decision in Nasim and Others drew attention to the finding made in Raju by Moses LJ that there is no ambiguity or lack of clarity regarding the "temporal" requirement in the fourth section of table 10 of Appendix A to the rules. That clear requirement was not met by the appellant. Nor do arguments based on evidential flexibility advance the appellant's case. Again, as explained in the first decision in Nasim and Others, the Secretary of State did in fact consider the evidence of the qualification obtained by the appellant, as is clear from the letter containing the notice of decision, but found it not to meet the requirements of the rules. And, of course, as the qualification obtained was taken into account and found wanting, there was no missing information or minor error requiring correction by means of the application of the policy.

16. So far as the de minimis principle is concerned, this is of no application in the present appeal. The requirement of the rule in issue is clear and, as the Court of Appeal held in Raju, there is no room for a "near miss".

17. Arguments based on fairness and legitimate expectation, and indeed the proportionality of refusing the application for leave to remain, were all considered by the Upper Tribunal in the two decisions in Nasim and Others. Those arguments do not have merit in the present appeal. The appellant is simply not in a position akin to those within the category of highly skilled migrants, who were encouraged to come to the United Kingdom on the basis of representations contained in the rules and elsewhere. He had no legitimate expectation that he would be given leave notwithstanding failure to meet the requirements of the rules. Again, there was no ambiguity in the rules themselves. It may very well be the case that others known to the appellant, perhaps including some he studied with, have been given post-study work leave. Mr Karim emphasised the importance of this aspect. However, there is no evidence before me remotely close to showing any systemic inconsistency in decision making by the Secretary of State. There is no evidence setting out the details in those other, successful cases and it is readily apparent that the Secretary of State's decision to refuse to vary the appellant's leave was accompanied by cogent reasons which related to the requirements of the rules. The fact that applications made by others succeeded, some following application and others following an initial refusal, has no substantial impact on the lawfulness of the decision made in the appellant's own case.

18. So far as the decision to refuse to vary leave is concerned, the decision to be substituted is dismissal of the appellant's appeal, as he has not shown that the requirements of the rules have been met.

19. I turn next to Article 8 of the Human Rights Convention and take into account the findings of fact I have already made. In this context, the

appellant must prove the facts and matters he relies upon and the standard of proof is that of a balance of probabilities (see the determination in EH (Iraq) [2005] UKAIT 00065). The appellant has not established family life in the United Kingdom. He first arrived relatively recently, in September 2009. His leave was extended in January 2011 and was valid until 28th February 2012. He made his application for post-study work leave about a week before his student leave expired.

20. Mention was made of Article 8 in the grounds of appeal to the First-tier Tribunal, at paragraph 7, although there is very little detail. The First-tier Tribunal judge's Article 8 assessment was also brief and, as noted above, there was no mention of Article 8 in the Upper Tribunal's determination.

21. Mr Duffy drew attention to the recent judgment of the Supreme Court in Patel and Others [2013] UKSC 72 and to the approach to Article 8 taken in the second decision in Nasim and Others. In that case, the Upper Tribunal found that those who have a desire, as former students, to undertake a period of post-study work in the United Kingdom, lie at the outer reaches of cases requiring an affirmative answer to the second of the five "Razgar" questions. Even if an affirmative answer needs to be given, so that Article 8 is engaged (as the First-tier Tribunal Judge found it was in the appellant's case), the issue of proportionality should generally be resolved decisively in favour of the respondent, by reference to her functions as the guardian of the system of immigration control, entrusted to her by Parliament (see paragraph 21 of the decision in Nasim and Others [2014] UKUT 00025). I have no doubt that the appellant may well have formed friendships since his arrival here as a student in September 2009. I have no doubt, either, that he has been well-aware that he has only had limited leave to remain throughout his time here. There is little detail of any particular friendships or associations and nothing to show that ties established here by him as a student, and following his post-study work application, cannot be maintained from abroad. The appellant has succeeded in obtaining an academic award and this may very well be useful to him in the future, on his return to Pakistan. Mr Karim drew attention to the funds invested by the appellant in his education and to wasted costs and to the disappointment felt over the past two years following refusal of his application for further leave. These features are typical of this sort of case and the appellant is in no different a position in this regard from the appellants in Nasim and Others and Raju. Overall, I find that Article 8 is engaged in the private life context. The appellant has no family life here. The decision to refuse to vary his leave was made in accordance with the law. So far as proportionality is concerned, in weighing the competing interests, I find that there is little of real substance to place in the balance on the appellant's side, taking into account the limited evidence before me, and very little to set against the Secretary of State's case. I conclude that the decision to refuse to vary leave, and the appellant's removal and consequence of that decision, would be proportionate to the legitimate public end being pursued, the operation of a coherent and fair system of immigration control, in the

interests of the economic wellbeing of the United Kingdom. The appeal on human rights grounds is dismissed.

Decision

22. The determination of the Upper Tribunal in the present case is set aside. A fresh decision is substituted as follows:

    (i) The appeal against the section 47 removal decision is allowed.

    (ii) The appeal against the decision to refuse to vary leave is dismissed.

    (iii) The appeal on human rights grounds, in reliance upon Article 8 of the Human Rights Convention, is dismissed.

24. There has been no application for anonymity at any stage in these proceedings and I make no direction on this occasion.

Signed Date

Deputy Upper Tribunal Judge R C Campbell

TO THE RESPONDENT
FEE AWARD

I have considered whether a fee award should be made. Although the appellant succeeded in relation to the section 47 removal decision, his appeal against the decision to refuse to vary leave has been dismissed and he did not succeed in making out his human rights case. In these circumstances, I make no fee award.

Signed Date

Deputy Upper Tribunal Judge R C Campbell