Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/21912/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 3rd March 2014	**On 10th April 2014**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MUHAMMAD DANISH AHMED

Respondent

Representation:

For the Appellant: Ms J. Isherwood, Senior Presenting Officer
For the Respondent: Mrs T. White, Counsel instructed by Adams Solicitors

DETERMINATION AND REASONS

1. Mr Muhammad Danish Ahmed is a citizen of Pakistan born on the 18th April 1987. He was the Appellant before the First-tier Tribunal and it is convenient if I continue refer to him throughout as the Appellant for the remainder of this determination.

2. He had first entered the United Kingdom on 3rd March 2008 with leave as a student and had subsequently been granted leave to remain as a student thereafter until 31st July 2010. On 3rd August 2010 he was granted further leave to remain as a Tier 4 (General) Student until 28th June 2012.

3. On the 22nd March 2012 he made a combined application for leave to remain in the United Kingdom as a Tier 1 (Post-Study Work) Migrant and for a biometric residence permit. The application was refused by the Secretary of State on 25th September 2012 under paragraph 245FD and a decision was made to remove the Respondent by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.

4. The basis for that refusal was that he had made his application under Tier 1 on 22nd March 2012 however from verifying the date of award the documentation provided at that time confirmed the date of the award was the 11th April 2012. The decision cited the Upper Tribunal decision of **NO (Post-Study Work – award needed by date of application) Nigeria [2008] UKIAT 0054** that the applicant must have been awarded the qualification at the date of the application and that the Immigration Rules state that the date of the award must be within the twelve months directly prior to the date of the application and the date of the award is after that date. The claimed points under Appendix B English language were refused due to the failure to meet the requirement for the eligible award.

5. The Appellant appealed that decision and it came before the First-tier Tribunal (Judge Edwards) sitting at Manchester on the 7th December 2012. In a determination promulgated on 13th December 2012 and having heard the evidence of the Appellant, he dismissed the appeal. The judge noted at paragraph 15 that the point in issue in the appeal was a "very narrow one" in that it concerned whether or not the Appellant had been awarded his relevant qualification no more than twelve months before the date of his application. At paragraph 15 the judge made reference to the Appellant's course of study namely an MBA at Kaplan Financial, the degree to be awarded by the Liverpool John Moores University. The Appellant had produced the letter dated 13th February 2012 stating that the completion/award date was 11th February 2012 and that the graduation ceremony would be on 11th July 2012. It went on to say that he had completed his course successfully, and that his certificate and transcript would be awarded "in the next three to four weeks". The judge made reference to a certificate that was dated 11th April 2012 and emails that were sent from the university to UKBA in August 2012. Thus the judge found the degree was not awarded until 11th April 2012 and not on either 11th or 13th February 2012. Applying the decision of the Tribunal in **NO**, he found that the Appellant could not succeed.

6. However, in respect of the removal direction under Section 47 of the 2006 Act, the First-tier Tribunal Judge did not deal with this issue and did not state that that was an unlawful decision. Thus he dismissed the appeal under the Immigration Rules and on human rights grounds.

7. Following the promulgation of the determination, the Appellant sought permission to appeal. Permission was refused by Designated FTT Judge Manuell on the 9th January 2013 but on 13th February 2013 permission was granted by Upper Tribunal Judge Perkins.

8. Thus the appeal came before the Upper Tribunal (Deputy Upper Tribunal Judge McClure) on the 9th May 2013. In a determination promulgated on the 13th May 2013 he found that the First-tier Tribunal had erred in law. His analysis is set out at paragraphs 5 to 10 of the determination that in the light of the decision of **Khatel and Others [2013] UKUT 0044** the judge was wrong to proceed on the basis that the claimant had to have obtained his eligible award prior to the date when he lodged his application with the UKBA and that provided Mr Ahmed had obtained his degree before the date of decision and had provided evidence of this before the date of decision, the award could have been taken into account. He therefore found there was an error of law in the decision of the First-tier Tribunal and allowed the appeal under the Immigration Rules. He noted that the judge had not dealt with the S47 decision and that the refusal to vary the claimant's leave was not in accordance with the law (at [11]).

9. The Secretary of State applied for permission to appeal to the Court of Appeal against the determination 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 the decision in **Khatel and Others**. The Secretary of State's grounds of application reiterated the critique of **Khatel** contained in the grounds of application that had been submitted to the Court of Appeal.

10. 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 Secretary of State 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 Secretary of State against decisions of the First-tier Tribunal, applying **Khatel**.

11. 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.

12. On 25th June 2013, the Court of Appeal allowed the Secretary of State's appeal against the Upper Tribunal's determinations in **Khatel** and the cases of three other applicants: **Raju and Others v SSHD [2013] EWCA Civ 754**.

13. 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—
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> …
>
> (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. 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**).

15. Further directions were sent out by the Upper Tribunal as follows: On 21st 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.

    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:

        (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

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

    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).

16. In compliance with those directions issued by the Upper Tribunal, further evidence and submissions were received by the Tribunal on behalf of the Appellant Mr Ahmed.

17. Thus the appeal was listed before the Upper Tribunal. Mrs White, Counsel appeared on behalf of the Appellant and the Secretary of State was represented by Ms Isherwood, Senior Presenting Officer.

18. A skeleton argument had been produced on behalf of the Secretary of State in response to directions from the Upper Tribunal. In that skeleton argument, it set out the history recited above. It made reference to the emails that were produced on 7th August 2012 from Liverpool John Moores University (the awarding body) at E1 of the Respondent's bundle informing UKBA that the Appellant's MBA had been awarded on 11th April 2012. The skeleton argument noted that there had been legal action taken against the university who had informed the Appellant that the date of the award was in fact 16th March 2012 which would make his application successful, if it were true and had the Secretary of State been notified that it was the case before 6th April 2012. The skeleton argument sets out that the Appellant was first notified that the date of the award was 16th March 2012 and that was in a letter dated 3rd December 2012, three months after the decision. Therefore the notification of the date of the award is 3rd December rather than 16th March. It is further submitted that the university delayed in awarding the Appellant his qualification and thus they retrospectively changed the date of the award and that at the date of the application the degree had not been awarded as it was not awarded until 11th April 2012. The skeleton argument also makes reference to Section 85A of the 2002 Act.

19. In her oral submissions Ms Isherwood submitted that there was an error of law in the determination of Deputy Upper Tribunal Judge McClure because it had been decided in the light of the decision of the Tribunal in **Khatel and Others (Section 85A - effect of continuing application) [2013] UKUT 00044 (IAC)** and that in the light of the decision of **Raju and Others v SSHD [2013] EWCA Civ 754** that he could not have allowed the appeal on the basis set out in the determination. She further relied upon the decision of **Nasim and Others (Raju: reasons not to follow?) [2013] UKUT 610 (IAC)** at paragraph 88 of that decision that **Raju** should be followed. Therefore there was a material error of law in the decision of Deputy Upper Tribunal Judge McClure.

20. Ms Isherwood made reference to the Appellant's arguments set out in Mrs White's skeleton argument noting that his case was that the evidence presented demonstrated that the decision of Judge McClure was right but for the wrong reason. She submitted that the judge did get it wrong by applying the wrong legal principle. She noted that the Appellant's argument was that at the time of the decision, the judge did not consider the other arguments that were to be advanced on his behalf and therefore the decision should be set aside. However that could not assist the appellant because of Section 85A of the 2002 Act and the documents from the University could not be adduced.

21. Mrs White had produced a helpful skeleton argument for the hearing which she relied upon. In that skeleton argument she made reference to the bundles of documentation that had been provided for the Upper Tribunal. The skeleton argument at paragraph 4 accepted that the application made by the Secretary of State had been made in time. At paragraph 5 it made reference to Rule 45 and the practice of reviewing a decision on receipt of an application for permission to appeal. In her submission, she stated that the Tribunal should not reopen the decision of Deputy Upper Tribunal Judge McClure. She stated that it was clear that the judge at the time of the hearing had based his decision solely on the decision in **Khatel** and on the basis that he would have succeeded even if the qualification was awarded in April (although that was in dispute) and therefore it was not inappropriate to decide the case in the Appellant's favour on the principal set out in **Khatel**. Thus it became immaterial as to whether the date of the award was 16th March, which is what the Appellant had stated, because the Appellant would have succeeded in the case of **Khatel** in any event. The relevance of **Khatel** was thought to be that the application was made on 22nd March 2012 but the Appellant did not obtain his qualification until April 2012 after the application but before the decision. **Khatel** said that in those circumstances he would be entitled to the points he claimed for the date of his award. As she stated **Raju** held that he would not be so entitled.

22. Mrs White submitted however, that was not the only, or indeed the primary, issue in the Appellant's appeal. In the evidence before the Upper Tribunal, including a supplementary witness statement and bundle of documentation, it was asserted by the Appellant that the information submitted to the Secretary of State concerning the date of his award was in fact incorrect and had been acknowledged to be incorrect by both the teaching college (Kaplan Financial Limited) and the awarding body, namely Liverpool John Moores University. Mrs White made reference to the documentation before the Tribunal including email exchanges between the Appellant and the teaching college, and a formal letter from the university which confirmed that the planned assessment board had been delayed and that the date of the award was 16th March 2012, which is before the application was made. The date of the letter was 3rd December 2012 (see page 21 of the bundle) noting that his award was indeed made on 16th March 2012 and that this was a letter written by the university registrar. The Tribunal was also referred to the Appellant's grounds to the Upper Tribunal at paragraph 11 in support of this argument. Since the hearing of the appeal on 9th May 2013, there was further evidence from the university acknowledging that the date of the award was indeed 16th March 2012. They have since agreed (without prejudice) to provide a sum of money of £4,200. It is submitted that that is evidence that a mistake of fact had been made by the university.

23. Mrs White in the skeleton argument and in her oral submissions acknowledged that the letter of 3rd December from the university was not before the First-tier Tribunal. As the skeleton argument states, that was no doubt because the argument then being advanced was the effective date of the award was in February relying on the letter dated 13th February 2012. Nonetheless, the argument that was subsequently put before the Upper Tribunal was also put forward in the Grounds of Appeal, albeit not with excessive clarity. However as the skeleton argument concedes, notification of

the date of the award must be from the awarding institution and not the teaching institution (as set out in the decision of **Nasim** (as cited) at paragraph 80). Thus she submits there were two separate arguments, other than that in **Khatel**, raised by the Appellant to say why his appeal should succeed. They were there to be advanced if necessary but those arguments had not been addressed. Thus she submitted that if a review under Rule 45 took place and a substitution of a decision dismissing the appeal was made, it would prevent those arguments from ever being addressed. Although she accepted that one of the arguments was wrong, the other argument, relating to the fact that the university had subsequently stated that the date of the award had been wrongly given and that it was 16th March 2012, was still an argument that would be unresolved. Thus she said in her oral submissions, the court, when looking at this issue should have an eye as to what is fair as an overriding concept and that he was not able to advance an argument if the decision is set aside and dismissed.

24. She further submitted that the decision of **Nasim** did not apply to this Appellant because, with the exception of the fourteenth Appellant, all the principal Appellants in the case of **Nasim** had been awarded their qualifications after the dates of their applications therefore their cases fell squarely within **Khatel** and **Raju** whereas this Appellant did not because he was awarded his qualification before the date of his application according to the documentation from the university.

25. In her oral submissions, Mrs White submitted that the Tribunal should exercise justice and fairness but also common sense and that given the history of the case, not to reopen the decision, when clear from the facts that to do so would be entirely unfair such a decision should not be taken. The Appellant, she reiterated, would not be able to put his case if the decision set the decision aside and that the most important argument before the Upper Tribunal had not been argued. She referred the Tribunal to paragraph 11 of her skeleton argument noting that the documentation now produced on behalf of the Appellant was that he had been awarded his degree by the university before he made his application and that he had been prevented from demonstrating this as a result of the delay from the university rather than any fault of his own and that the university had later provided information to the respondent about the date of his award which they now themselves stated was wrong. Thus she submitted, the Upper Tribunal got the right answer, even if it was for the wrong reason.

26. In her oral submissions she made reference to paragraph 11 and where the affect of the provisions of Section 85A of the 2002 Act were referred to. She stated that this prevented the Appellant from adducing any new evidence that was not before the Respondent at the date of the decision, to prove his entitlement to points as clarified in the decision of **Nasim** at paragraph 76 but that it did not prevent the consideration of that evidence for other purposes, including human rights. The combination of the factors raised potential problems of fairness, justice and disproportionate interference with private life for the Appellant and thus if that was added to the prospect of dismissal of his appeal, without further hearing, because the decision on his appeal focused on only one of his arguments and the approach that had been

taken had since been overruled in a separate case (in this case **Raju**) the apparent injustice appears very great indeed.

27. Thus she submitted that it had not been shown that had **Raju** been decided before this appeal was heard in the UT, it would have had a material effect on the decision. She stated that it would have affected the reasoning, and would have forced attention on the Appellant's other Grounds of Appeal, but does not mean that it could or would have affected the decision. It was irrelevant to the real issue as to whether or not the Appellant's degree was awarded before his application. Thus she submitted, the necessary preconditions for a review were not met. The Appellant was not arguing that, despite **Raju** he should succeed with a qualification awarded after his application because it was his case that his degree was awarded before his application thus on that basis, like the fourteenth Appellant in **Nasim**, the judgment in **Raju** could not affect the correctness of the original UT decision.

28. In the alternative, it was submitted that as a matter of discretion the Upper Tribunal should not review the decision, or if the Tribunal decided to do so, should take no action on it. At paragraph 13, it was submitted that what mattered was that the Appellant should not find his appeal now dismissed because, understandably at the time, only one of his arguments was considered and that has since been overruled. He would have a strong sense of injustice from an outcome which meant that, although he was in fact awarded his degree in time, he was not allowed to prove that or even to argue the case. The Upper Tribunal has a discretion and it should be exercised in his favour. In this context, in her oral submissions she reminded the Tribunal that the case had been ongoing since 2012 and that the university had made a factual mistake and that this had led to the Appellant having to wait for an opportunity for that to be dealt with. She submitted that had the Deputy Judge allowed the appeal under the contrary argument then the Appellant would not be in the position that he currently is. However, the judge decided it upon a principle which is now found to not be the case and there is a "glaring unfairness" in such an approach. She submitted that this was a case that needs to be looked at by the Tribunal holistically when looking at the issue of fairness.

29. Towards the end of her submissions, the Appellant indicated he wished to give some instructions to Mrs White and thus the Tribunal gave the parties time to do so. Upon resuming her submissions, Mrs White stated that her client wished to reiterate the point that he had been in the United Kingdom legally and had been studying and had obtained his qualification as a chartered accountant. She submitted that her overriding argument was that the court should not reopen the decision in the first place and that it had been properly stated by the university that the degree was awarded on 16th March 2012 which was before the date of the application and that the case fell under the common law duty of fairness thus the case should not be reopened.

30. By way of reply Ms Isherwood on behalf of the Secretary of State submitted that the Appellant only commenced enquiries in October 2012 which was after the decision in September. She conceded that the Appellant was in an unfortunate position that he

did not meet the Rules and whilst there were unusual circumstances in this case, he could not succeed. In respect of the decision of the Tribunal in **Nasim (2)** in Article 8 terms, the Appellant came as a student and had no legitimate expectation to remain and there is no unfairness in this case. She made the point that the Appellant did not inform the Respondent that he had obtained his date of award in March before the date of decision. She further submitted that much emphasis had been placed on Article 8 that the Appellant had no legitimate expectation to be entitled to stay and it cannot be argued that because friends had been granted visas that he should be granted a visa. He had been in the United Kingdom on 3C leave and there has been no evidence about what he has been doing in the interim. She posed the question as to how had the Appellant been unfairly treated? The decision of **Nasim (2)** demonstrated that it was insufficient to enter the United Kingdom as a student and to argue that you would be entitled to stay due to the award being granted after the date of the application.

31. Mrs White, wished to reiterate at the conclusion of Ms Isherwood's submissions, that the Appellant's case did not fall within the **Nasim** category and that it would not be right to overturn Judge McClure's decision. She submitted that the university had got it wrong and that was crucial when looking at the issue of fairness and that it was not a separate legal matter. She referred the Tribunal to the relevant letters, both from the awarding body namely the university making it clear that the awarding date was 16th March 2012.

32. At the conclusion of the submissions, I indicated to the parties that whilst I had not made a decision upon the issues raised by the parties, that it would be of assistance to hear evidence from Mr Ahmed now, rather than at a later stage if it were thought to be necessary so that there would not be any further delay. Both parties were in agreement.

33. Mr Ahmed gave evidence and confirmed that the statements that he had filed before the Tribunal and their contents were true. Mrs White asked him what further information he would wish to give to the court and he stated that he had been in the United Kingdom for a period of six years and been in litigation for two years and that he had studied accountancy and had been awarded an MBA. He stated that it had been out of his control and out of his hands (concerning the information about the date of the award) and that the facts had not been considered by the judge. He further stated that he wished to move on with his life and that there had been an error made by the university.

34. In cross-examination he was asked to clarify if he had now become a chartered accountant. He said that he had. He said he believed an error had been made by the university and that he should succeed in his appeal. He said that he was not working at the moment but had been working when his appeal was allowed but following this had to resign. He explained why namely that the employer was asking for leave to remain and he lost his job when the Secretary of State appealed as he could not give his employers a visa and they could not wait. He said that on his student visa he did have permission to work. He said that he had some family in the

United Kingdom namely his uncle, maternal uncle, aunts and cousins and he had his father in Pakistan.

35. At the conclusion of the submissions I reserved my determination.

Analysis and Discussion:

36. I have carefully considered the competing submissions made by the parties and the documentation relied upon and I have been ably assisted by both advocates in advancing their respective cases before me. I should also observe that I accept the factual account given by the Appellant concerning the events as they have unfolded.

37. I begin my assessment of this appeal by noting that the circumstances of this appeal are highly unusual. These circumstances it is said, are very different from the Appellants in the decision of **Raju** and also from the Appellants in **Nasim** who sought to argue their cases on a different footing. The principal argument advanced by Mrs White on behalf of the Appellant is that the Tribunal should not set aside the decision of the Upper Tribunal for the reasons set out in the skeleton argument and in the preceding paragraphs. The thrust of those submissions were to the effect that to do so would be unfair to the Appellant and would preclude him from advancing the other arguments that he had sought to put before the Upper Tribunal but which had not been decided upon because the case of **Khatel** at that time was determinative and thus it was unnecessary to consider the other arguments. Thus it is submitted that there was a further argument, other than that dependent upon **Khatel** as to why his appeal should succeed and those arguments have not been addressed and that the review and substitution of a decision dismissing the appeal would prevent them from ever being addressed. In this case, she submits, it is clear from the documents now produced that the Appellant had been awarded his degree by the university before he made his application and was prevented from proving this as a result of the delay made by the university rather than any fault through his own and that the university have provided information about the date of his award to the Respondent which they now themselves say was a mistake in fact. Thus the Tribunal got the right answer, even if it was for the wrong reason.

38. I have therefore considered the power of the Tribunal to set aside the decision of the Upper Tribunal. The history recited earlier in this determination demonstrates that before this case was listed for a hearing to consider the setting aside under Rule 45, the Secretary of State had applied for permission to appeal to the Court of Appeal. The relevant legislation set out in the Tribunals, Courts and Enforcement Act 2007 in conjunction with the Tribunal procedure (Upper Tribunal) Rules 2008 indicate that it is within the jurisdiction of the Upper Tribunal to set aside its decision in particular limited circumstances. Those are set out in Section 10(4)(c) and Rules 45 and 46. It is plain that a decision on whether to exercise such a power must take place before any consideration of whether to grant permission to appeal to the Court of Appeal. Rule 45(1) sets out that upon receiving an application for permission to appeal, the Upper Tribunal may review its decision in accordance with Rule 46. If the decision of the

Upper Tribunal is set aside, then there is no longer any basis for considering whether to grant permission to appeal.

39. Rule 45(1)(a) provides that the Upper Tribunal may review a decision of the Upper Tribunal if "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 affect on the decision." It is argued on behalf of the Respondent that since the Upper Tribunal decision in **Khatel**, upon which the appeal of this Appellant was allowed, there has been a judgment in **Raju and Others** which constitutes binding Court of Appeal authority overturning the decision in **Khatel**. It seems to me that the relevant part of that provision is the discretion given to the Upper Tribunal in reviewing an earlier decision of the Upper Tribunal and whether it would have had "a material effect on the decision".

40. In this context as Rule 45 sets out, the Upper Tribunal may review a decision of the Upper Tribunal if "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." The Appellant submits that the decision in **Raju and Others**, whilst a binding Court of Appeal authority, does not have a material effect on the decision made by the Upper Tribunal and thus the Tribunal should not set aside the decision.

41. I am satisfied that there is jurisdiction to consider whether to set aside the decision of the Upper Tribunal and that it is in accordance with the overriding objective of the Procedure Rules to deal with cases justly and fairly (see Rule 4). The procedure that has been adopted by the Tribunal was to notify the parties in advance of the hearing that it would consider whether to exercise its powers to set aside the decision and both parties have had the opportunity to address this by providing their respective skeleton arguments.

42. The decision of the Upper Tribunal (Deputy UT Judge McClure) proceeded solely on the basis of the decision in **Khatel**. It is plain from the determination that the judge allowed the appeal solely on the principles set out in the case of **Khatel**. He set out at paragraph 7 the relevant timeline namely that the Appellant made his application on 22nd March 2012 to remain as a Tier 1 (Post-Study Work) Migrant. The decision was made on 25th September 2012. At paragraph 5 the judge made explicit reference to the decision of **Khatel** noting that the case made the point that an application is not complete until the date of decision. The judge considered the evidence in the refusal letter at paragraph [8] noting

> "The Appellant had been refused the points because he had not submitted his qualification with the initial application on 22nd March 2012. However an examination of the refusal letter makes the point that the eligible qualification was obtained in the middle of April 2012 and was submitted. Accordingly the eligible qualification was submitted to the Secretary of State prior to the decision being taken."

43. And at paragraph 9 the judge stated:-

> "As the Appellant had submitted the qualification in April 2012 to the Secretary of State the principles set out in the case law cited come into play. As the application was not completed until the date of decision in September the Secretary of State did have the required qualification prior to the date of decision and prior to the completion of the application. In those circumstances the Appellant had submitted the qualification and was entitled to 15 points under attributes – date of obtaining eligible award and to 10 points under English language."

Thus he allowed the appeal.

44. The point made by Mrs White is that the judge based the decision on **Khatel** and did not consider any other argument. This was not surprising as **Khatel** was determinative of the issue in the Appellant's favour. However she goes on to submit that this was not the only issue in the appeal and that there were two arguments to be advanced before the Upper Tribunal in May 2013 other than those based on **Khatel**. The first argument is that the effective date of the award was 11th February 2012 (relying on the letter from Kaplan Finance Limited (the Appellant's college)). That letter stated that the award date was 11th February 2012 and noted that a transcript and certificate would be made available shortly. This was advanced in the Grounds of Appeal (see paragraphs 4 and 8). However in the skeleton argument prepared by Mrs White at paragraph 9, she concedes that this could not succeed before the Tribunal because the notification of the award is dependent on the awarding institution and not the teaching institution (see table 10 annex A attributes paragraphs 69-70 and also the decision of **Nasim** at paragraph 80).

45. This leaves the second ground; the documentary evidence before the Upper Tribunal that the information provided to UKBA in the email of 7th August 2012, (that the date of the award was 11th April 2012) was incorrect and was acknowledged to be incorrect by the teaching institution and the awarding body, Liverpool John Moores University and that the evidence set out in a letter from the university dated 3rd December 2012, in conjunction with the emails at the date of the award was 16th March 2012 and therefore before the application was made. Therefore she submits that the Appellant had been awarded his degree by the university before he made his application and that he was unable to show this as a result of the delay of the university rather than any fault of his own. Thus it is submitted that the Upper Tribunal got the right answer even if it was for the wrong reason.

46. In those circumstances she submitted that it would not be right for the Upper Tribunal to exercise its discretion to set aside the decision because firstly, this argument was not reliant on **Khatel** principles, it had not been addressed by Judge McClure and by substituting a decision to dismiss the appeal would prevent such an argument from ever being addressed. The second point made is that the effect of the provisions of Section 85A of the 2002 Act prevents the Appellant from adducing new evidence (although not for human rights) and the combination of those factors, raise

problems of fairness and justice and the disproportionate interference with the private life of the Appellant.

47. The argument at paragraph 11 of the skeleton argument and advanced in her oral submissions was that if the appeal was dismissed without further hearing it would be unfair because the hearing before the Upper Tribunal focused on only one of the arguments. She also makes the point that it has not been shown that the decision in **Raju** had it been decided before the appeal would have had any material effect on the decision and that **Raju** was irrelevant to the real issue of whether or not the Appellant's degree was awarded before the application and therefore the judgment in **Raju**, or **Nasim** cannot affect the correctness of the Upper Tribunal decision because the Appellant was not arguing that despite **Raju** he should succeed but that his qualification was awarded before he made his application.

48. To consider the arguments it is necessary to consider the factual background, the timelines involved and the evidence produced. The Appellant made the Tier 1 application on 22nd March 2012. He provided evidence of the application, that he had passed his dissertation and that he would be awarded his qualification on 11th February 2012. An email was sent on 10th February 2012 confirming that he had successfully completed his MBA and that he would be issued with a degree later. Those emails stated that his results board took place on 3rd February and that he had passed the dissertation and the transcript would be available "in the next four to six weeks". The letter dated 11th February 2012 came from Kaplan Financial Services (the teaching institution). It is accepted that this evidence could not have satisfied table 10 of Appendix A paragraph 70 as it did not emanate from the awarding institution. In any event, prior to the decision being taken by the Secretary of State, further enquiries were undertaken by the UKBA officials to clarify the date of the award before making such a decision. The email was sent on 7th August and a reply was received on the same day from the university confirming that the award was made on 11th April 2012. Following this, the decision was made by the Secretary of State on 25th September 2012 refusing the application based on the information supplied by the university themselves and in conjunction with the information supplied by the Appellant that the date of the award was 11th April 2012.

49. The Grounds of Appeal issued by the Appellant on 8th October 2010 sets out the following;

    (i) At paragraph 4, the letter from the Tier 4 Sponsor states the date of the award was 11th February 2012 (page 21 of the bundle) not 11th April 2012.

    (ii) At paragraph 5 it reiterates this and that the college letter issued on 11th February 2012 gives written notification of the award of his qualification.

50. At this stage there is no reference to any other information from the university.

51. In the witness statement for the purposes of the First-tier Tribunal hearing in December 2012, some three months after the refusal, there is no reference to any

other information from the university that the date was given incorrectly. Indeed the Appellant produced a copy of the certificate in which it is stated:-

> "This is to certify that Muhammad Ahmed Danish has been awarded the degree of the masters in business administration dated 11th April 2012."

Consequently the First-tier Tribunal dismissed the appeal on the basis of the law as it then was and on a finding that the date of the award was 11th April 2012. The Appellant therefore not demonstrating that he had been awarded his qualification in the preceding twelve months which was required under the Rules.

52. However it is clear that there were two pieces of evidence that were not considered by the First-tier Tribunal, through no fault of the Tribunal Judge. The first piece of evidence was a letter from the university dated 3rd December 2012 (see page 21 of the Appellant's bundle before the Upper Tribunal in May). The letter seeks to clarify the dates relating to the meeting of the formal assessment board and the conferment of the award. It further notes that all the work was submitted and marked within the timescales and that the board was scheduled to take place 3rd February 2012 however owing to technical and administration problems the board had to be postponed. The letter went on to say that the Regulations of the university required a

> "properly constituted assessment board to be held in order to make recommendations for an award. The postponed assessment board was subsequently held on March 16th 2012 and recommendations for approval of awards were made to the university's academic board. The university can confirm that the award date is, therefore, March 16th 2012."

This letter was never put before the First-tier Tribunal. The reasons are not entirely clear. The witness statement from the Appellant (see paragraph 3; 6th May 2013) is that the letter was provided to his legal representative but was not used. He stated that his legal representative refused to show the evidence to the Immigration Judge because he deemed it to be "irrelevant and unnecessary". The Appellant stated that he did not understand why he took this course of action but that it was a "key piece of evidence that was not submitted." Mrs White in her skeleton argument (paragraph 9) states that it was not provided no doubt because the argument being advanced was the award date was 11th February 2012.

53. The second piece of evidence is that in or about October 2012, the Appellant contacted Kaplan Financial Services and the university with a letter of complaint regarding the date of the award and email correspondence between the Appellant and the university ensued (see pages 5-21 of bundle A; before UT Judge McClure). Those emails were never put before the First-tier Tribunal either.

54. The Appellant sought leave for permission to appeal the First-tier Tribunal decision (see pages 32-39 of bundle A before Deputy UTJ McClure). Again relying on a number of matters however the most relevant is at paragraph 11 (page 36) setting out that the Secretary of State had considered the date of the issue of the certificate as the date of the award which was wrong and that the letter from the Liverpool St John's

University confirmed that the date of the award was 16th March 2012. The application came before Designated First-tier Tribunal Judge Manuell on 9th January 2013. It is plain from reading the document that the application for permission to appeal was not admitted. At paragraph 2 the judge set out the grounds for delay in issuing the application but he found that there were no special circumstances to extend time. He went on nonetheless to consider the merits but found at paragraph 3 that the grounds sought to "introduce new evidence which was not before the judge and which the judge thus could not have taken into account." He referred to the grounds as "specious" (see paragraph 4) and found that the conclusions reached were open to the judge and were properly reasoned. Thus the application for permission to appeal was not admitted. The Appellant sought permission to appeal to the Upper Tribunal on essentially the same grounds. This application was not considered until 13th February 2013 by Upper Tribunal Judge Perkins and by that time the Tribunal had promulgated the decision in **Khatel and Others (Section 85A; effect of continuing application) [2013] UKUT 44 (IAC)** and following that, the Upper Tribunal Judge considered that it was arguable that he did have the necessary award on 11th April 2012 on the basis of **Khatel** and therefore he extended time and gave permission to appeal.

55. It is plain from reading the documents that the permission was granted on the basis that the qualification was awarded on 11th April 2012 despite it being clear that the argument now before the Upper Tribunal, irrespective of **Khatel** was that there had been a mistake as to the actual date of the award. Thus I am satisfied that at the time of the hearing before the Upper Tribunal there was another argument that was capable of being advanced but was not because, as Mrs White submits, in **Khatel** was a decision in favour of the Appellant and thus it was not necessary for the judge to consider any competing arguments.

56. Whilst I am satisfied that there was a competing argument that was capable of being advanced, it seems to me that that is quite different from stating that this was an argument capable of succeeding and that the judge reached the right result but for the wrong reason. I should state that in this regard the thrust of the submissions made by Mrs White on behalf of the Appellant is that it would be wrong to set aside the decision of the Upper Tribunal because an alternative argument was not placed before the Tribunal because of the decision in **Khatel** and that if the decision is set aside it does not give the Appellant the ability to advance such alternative argument. In my judgment, that is not correct. It seems to me that in deciding whether or not there was a competing argument that was capable of being advanced and whether it was an argument capable of succeeding when considering her principle submission that the judge reached the right result but for the wrong reason, necessarily involves consideration of the merits of the alternative argument. I have therefore looked and considered the evidence that was before the Upper Tribunal in May 2013. I have set out earlier the documentation that was before Deputy Upper Tribunal Judge McClure which included the letter of 3rd December 2012, and the emails between the Appellant and the university from October onwards. The documents that were before the Upper Tribunal have been helpfully provided in a bundle and has been marked as "bundle A". The hearing before Judge McClure took place on 13th May

2013. In considering that information, the letter of 3rd December 2012 would not have been admissible under the provisions of Section 85A of the 2002 Act. The Appellant was not able to meet the requirements of the Immigration Rules under Appendix A because they required that he had been awarded the eligible qualification within the twelve month period. Table 10 of annex A "attributes" states as follows:-

> "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."

Thus paragraph 70 makes it clear that the qualification will have been deemed to have been obtained on the date on which the Appellant was first notified in writing by the awarding institution. Whilst Section 85A of the 2002 Act does not prevent a Tribunal from considering evidence that was before the Secretary of State when she took the decision even if post application (see **Nasim** at paragraph 76), the letter was dated 3rd December 2012 and was significantly after the decision and could not have been taken into account by Deputy Upper Tribunal Judge McClure (nor even if it had been produced before the First-tier Tribunal Judge Edwards) in reaching a decision about whether or not the Appellant met the Immigration Rules. Section 85A is primary legislation and is binding on the Tribunal. As the skeleton argument on behalf of the Secretary of State (see page 2) notes, it has not been explained how the Tribunal would be able to take into account the letter of 3rd December, and any subsequent documentation (given that this is a case to which Section 85A of the 2002 Act applies). It is right to note that Mrs White made reference to Section 85A at paragraph 11 of the skeleton argument in which she noted that the Section operated so as to prevent the Appellant from adducing any new evidence not before the Respondent at the date of decision but stated that it did not prevent consideration of that evidence for other purposes, including human rights. It was further submitted at paragraph 11 and in her oral submissions that the combination of these factors raised problems of "fairness, justice and is a disproportionate interference with the private life of the Appellant." Thus it appears to be acknowledged that the evidence could not be taken into account by either the Upper Tribunal Judge McClure or before the First-tier Tribunal (even if the documents had been put before Judge Edwards) but that it should be taken into account when considering the private life of the Appellant and matters of fairness.

During the hearing I enquired of the parties as to whether or not the Appellant had made an Article 8 claim. Both parties on perusing the documentation in the bundles, could find no document in which grounds relating to Article 8 were referred to. The

Grounds of Appeal submitted on behalf of the Appellant on 8th October 2012 against the decision of the Respondent make no reference to Article 8 grounds as a Ground of Appeal and as the First-tier Tribunal Judge (Edwards) noted at paragraph 23 "no human rights argument was advanced before me and none appears to be readily obvious to me." There has been no Section 120 notice served on the Respondent or the Tribunal at any time throughout the proceedings and therefore there is no jurisdiction for the Tribunal to consider any Article 8 grounds.

57. As to arguments based on fairness generally, they have not been particularised other than in the general sense that fairness requires the evidence that was not admissible under Section 85A to be taken into account in general terms and on the basis that if the decision is set aside under Rule 45 it would prevent consideration of his argument. I have dealt with that earlier. It seems to me that the argument submitted that to set aside the decision would be unfair on the basis that the Appellant would not be able to advance his case on the alternative argument that he would have had before Deputy Upper Tribunal Judge McClure is not arguable. The merits of the alternative argument and the documentation (including the Appellant's witness statements, letters from the university, the information that has been subsequently provided concerning the claim made against the university) is relevant information in considering whether or not the decision should be set aside, or to put it another way, if the Appellant would have succeeded on the alternative argument, then any error of law made by the Deputy Upper Tribunal Judge would not be material. Thus the alternative argument by necessity has to be considered in this exercise.

58. In my analysis set out earlier in this determination, I have considered that the Appellant would not have been successful before the Deputy Upper Tribunal Judge McClure even advancing his alternative argument by producing documentation to show that the date of the award was 16th March 2012 because the document relied upon could not have been taken into account by the judge due to the operation of Section 85A of the 2002 Act for the reasons that I have set out. It could not have been considered under Article 8 either as the Appellant had not sought to appeal the Respondent's decision on Article 8 or human rights grounds nor has there been any Section 120 notice relying on such grounds subsequent to that.

59. As to the general argument of fairness, I do not consider that the general argument concerning fairness has been made out. The general principles concerning fairness in this context demonstrate that in the context of a statutory scheme, the public law requirement of fairness must be observed and fairness may impose additional obligations on the Secretary of State as the decision maker under the points-based system. The Secretary of State is therefore under a common law duty to act fairly in deciding claims properly made. The Respondent's failure to act fairly is a failure to act in accordance with the law and a failure to make a decision in accordance with the law is a Ground of Appeal to the Tribunal under Section 84(1)(e) of the 2002 Act. Thus the Tribunal has jurisdiction to determine that a decision is not in accordance with the law because of a lack of fairness. As the Tribunal said in **Fiaz (Cancellation of leave to remain and fairness) [2012] UKUT 0057 (IAC)**, this is not to be downgraded to a general power to depart from the Rules where the judge thinks

such a course appropriate or turn a mandatory factor into a discretionary one; fairness in this context is essentially procedural.

60. The factual history above demonstrates that when the decision was taken by the Secretary of State, it was a decision taken properly and one that took into account all the evidence that had been placed before the Secretary of State. The application was made on 22nd March 2012 and accompanying that application was documentation provided by the Appellant (including letter from Kaplan Financial Services dated 13th February 2012 stating that the completion and award date was 11th February 2012 and graduation 11th July 2012; a letter saying that he had completed the course of study and that the award would be made "in the next three to four weeks"). As accepted by Mrs White and for the reasons already set out that letter could not satisfy the Immigration Rules as it came from the educational provider rather than the awarding body. However the Secretary of State did not leave the matter there but sought further information for clarification from the university, who was the awarding institution and the body to provide the requisite information by way of email exchange. Those emails exchanged from the university registrar and UKBA on 7th August 2012 confirm that the Appellant was awarded his MBA on 11th April 2012. A certificate of award for the degree on that date was put before the First-tier Tribunal.

61. It cannot be said when based on the factual background set out above, that the decision of the Secretary of State was unlawful in any respect nor can it be said that there was any flaw or unfairness demonstrated in the decision making process and at the time the decision was made on 25th September 2012 the decision was made on all the evidence before the Secretary of State. It was not even argued at the hearing in December that there had been any unfairness. The letter sent by the university on 3rd December 2012 makes reference to the delays owing to the "technical and administrative problems" with the board meeting and noted the date of the award was March 16th 2012. That letter came three months after the decision made by the Respondent which was made entirely lawfully. In those circumstances it could not be said that the Secretary of State in September 2012 had made an unlawful decision nor can it be said the Secretary of State acted unfairly in the decision making process; there has been no procedural error demonstrated on the part of the Secretary of State.

62. Therefore in summary, I am satisfied that the decision of the Upper Tribunal should be set aside. As noted earlier, since the Upper Tribunal decision in **Khatel** there has been the judgment in **Raju and Others**, which constitutes binding Court of Appeal authority overturning **Khatel**. Furthermore, it has not been demonstrated that the Appellant could have succeeded in the alternative argument that he would have advanced for the reasons given above and therefore in those circumstances I set aside the decision of the Upper Tribunal.

63. This necessarily leads me to the decision of the First-tier Tribunal. The grounds that have been advanced in respect of the decision to set aside are those arguments also relevant to the decision of the First-tier Tribunal. For the same reasons therefore, it cannot be said that the First-tier Tribunal made an error of law in respect of the

decision made under the Immigration Rules. However an error of law has been made out in relation to the Section 47 decision which was not dealt with by the judge. Therefore in remaking the appeal I dismiss the Appellant's appeal except in relation to the Section 47 decision (in respect of removal)which I hold to be not in accordance with the law.

64. As I have set out in this determination, the factual background to this appeal is most unusual. I have taken the facts that have been given by the Appellant as the correct factual background including the documentation from the university but have found that in law, despite that factual background, it has not been demonstrated that he could succeed in this appeal. However in the light of the most unusual factual background and one that the Secretary of State is now aware of, I have no reason to assume that the Secretary of State will not consider any request made by the Appellant to look afresh at the application in the light of the facts as we now know them to be and that consideration will be given to exercising a discretion outside the Rules in his favour.

Decision

65. The decision of the Upper Tribunal (Deputy Judge McClure) is set aside.

66. The determination of the First-tier Tribunal (Judge Edwards) involves the making of an error on a point of law and is set aside.

67. I remake the appeal against the immigration decision of 25th September 2012 and dismiss it on all grounds save that the appeal against the Section 47 decision under the 2006 Act is allowed as it is not in accordance with the law.

Signed Date

Upper Tribunal Judge Reeds