Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/21916/2012

THE IMMIGRATION ACTS

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

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

MR MUHAMMAD RAMZAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Chohan (Counsel)
For the Respondent: Mr P Duffy (Home Office Presenting Officer)

DETERMINATION AND REASONS

Background and Procedural History

1. On 25th 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 3rd April 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 6th July 2012, a little over three months after his application for leave. 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 the application 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 N M K Lawrence ("the judge") in a determination promulgated on 3rd December 2012. 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 took into account the appellant's presence in the United Kingdom with student leave since 2007 but dismissed the appeal on human rights grounds.

4. Permission to appeal was granted on 7th March 2013, in the light of the decision in Khatel [2013] UKUT 00044. The Upper Tribunal then allowed the appeal in a determination promulgated on 3rd June 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 did not distinguish between the immigration decisions made by the Secretary of State 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. Four days beforehand, the appellant provided "amended grounds" in support of his case. Mr Chohan, who appeared on his behalf, adopted those grounds and Mr Duffy was given an opportunity to read and assimilate them.

The Submissions Made by the Parties in Response to the 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 25th September 2012, long before 8th May 2013 (when section 51 of the Courts and Crime Act 2013 came into effect).

8. Mr Chohan adopted the amended grounds although he was not the author of them.

9. In the grounds, the issue was isolated as whether or not the appellant was entitled to 15 points under the fourth section of Table 10, in Appendix A. It was stated that he relied upon arguments not discussed in either Khatel or Raju. I observed at this point that many (if not all) of the arguments were, however, considered by the Upper Tribunal in Nasim and Others [2013] UKUT 610 and Nasim and Others (Article 8) [2014] UKUT 00025.

10. In summary, it was contended in the grounds that the Court of Appeal in Raju focused on Table 10,

> "without any consideration of relevant Home Office guidance, policy, the application form and the award of 20 points for qualification on post-application evidence as well as jurisprudence which permits post-application to be considered that predates decision as discussed in below paragraphs (sic)."

11. In the subsequent paragraphs, mention was made of the Tier 1 application forms in use before 5th April 2012 and to part G5 of the form, which invited an applicant to tick a box to show that a letter had been sent from his teaching institution. The grounds also included claims that the appellant in the present appeal had a legitimate expectation that his application would succeed, not least because of the past practice of the Secretary of State of awarding points in other, similar cases and in the light of policy guidance published in April 2012. This suggested that the "date of award" requirement was satisfied even where there was no certificate from the awarding body and so the appellant could succeed where his teaching institution confirmed that an award "will be issued". Moreover, as some claimants had been awarded points and received post-study work leave, the Secretary of State had not decided the cases consistently.

12. Mention was also made of evidential flexibility and the de minimus rule, described as enabling a "defendant" to obtain material showing that the requirements of the rules were met even after submitting an application. Finally, the amended grounds assert, for Article 8 purposes, that the appellant invested substantial funds in the expectation of gaining post-study work experience. The amended grounds include this conclusion, at paragraph 29: "It is not accepted that Nasim and Others is a complete answer to the appellant's grounds above".

13. Mr Chohan said that so far as he was aware, there was no further appeal from Raju yet listed in the Supreme Court, although an application may have been made. The Secretary of State had a duty to make rules that were not ambiguous and policy guidance had been issued in the post-study work category to supplement the rules. These invited claimants to make an application. Guidance was sent out to colleges. When the appellant and others entered the United Kingdom, post-study work was part of the student package. The appellant and others in his position chose the United Kingdom because of a particular career path which included this element. The application form at G5 invited an applicant for leave to indicate that a letter from the provider of his course had been sent. The Secretary of State granted post-study work leave initially in many cases. There was a second category where applicants were refused leave but the Secretary of State then withdrew her decisions and granted leave subsequently. In a third category, successful appeals led to the grant of post-study work leave and the appellant was in a fourth category, where leave had been refused. Mr Chohan said that the Secretary of State had not looked properly at the appellant's case in the light of the closure of the scheme. He applied before April 2012. The Secretary of State had not stated clearly why she had discriminated against him in refusing his case.

14. The appellant relied on the application form, the guidance and the material sent to the course providers. Overall, the Upper Tribunal had come to the correct decision in allowing his appeal in the light of the case law at the time. The Secretary of State granted leave to some applicants but not others and so this was evidence of inconsistent decision making and amounted to unfairness. The appellant was entitled to be treated in the same way as those granted leave and he had a legitimate expectation that this would be so.

15. Mr Chohan said that the appellant relied on private life ties in the Article 8 context. He enjoyed no family life in the United Kingdom.

16. Mr Duffy said that the Secretary of State relied on the judgment of the Court of Appeal in Raju, the two decisions in Nasim and Others and, in the Article 8 context, on the judgment of the Supreme Court in Patel. Arguments based on fairness and legitimate expectation, and the other aspects raised by the appellant in this case, were dealt with in the two

Nasim cases. Mr Duffy submitted that the Upper Tribunal should follow that guidance. So far as the grants of leave in other cases were concerned, without knowing the particulars or details of those cases, and knowing so little about their circumstances and why they were allowed, it was apparent that the appellant could not succeed in showing unfairness. In some cases, for example, the grant of leave may have been a consequence merely of the missing of a deadline to appeal by the Secretary of State.

17. Mr Chohan made a brief response. The Secretary of State had approached the Upper Tribunal after judgment was given in the Court of Appeal in Raju, even though it may have been the case that she missed the deadline for doing so.

Findings and Conclusions

18. 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.

19. The decision substituted in relation to the section 47 removal decision is simply to allow the appellant's appeal against it. On the date it was made, on 25th 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.

20. 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 Chohan made careful submissions on the appellant's behalf and adopted the "amended grounds" which the appellant also relied upon. I find that the judgment in Raju and the guidance given in the two decisions in Nasim and Others ought to be applied. There is no sensible reason to do otherwise. The fundamental difficulty the appellant faces is that his application was made on 3rd April 2012 but the qualification he relied upon, required to have been obtained within the period of twelve months prior to that application, was awarded only on 6th July 2012. As explained in the first decision in Nasim and Others, neither the guidance issued by the Secretary of State in July 2010 and, subsequently, in April 2012, nor the casework instruction of 23rd May 2012 (which was not expressly relied upon in the present appeal) make any substantial difference. As noted at paragraph 41 of the first decision in Nasim and Others, Moses LJ held in Raju that there is no ambiguity or lack of clarity regarding the "temporal" requirement in the fourth section of Table 10. That clear requirement was not met by the appellant.

21. Arguments based on fairness and legitimate expectation, and indeed the proportionality of refusing the application for leave, were all considered by the Upper Tribunal in the two decisions in Nasim and Others. So too was the claim that the Secretary of State decided applications inconsistently. Those arguments do not have merit in the present appeal. The appellant is not remotely 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 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 that he studied with, have been given post-study work leave but 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 successful cases and it is readily apparent, in contrast, 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, simply has no substantial impact on the lawfulness of the decision made in the appellant's own case.

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

23. I turn, finally, to Article 8, and take into account my findings in paragraphs 20 and 21 above. The appellant has established no family life ties in the United Kingdom. He first arrived here in October 2007 with leave as a student. That leave was extended twice, on the second occasion until 31st May 2012. He made his application on 3rd April that year, for post-study work leave, in anticipation of the closure of that category.

24. The grounds of appeal to the First-tier Tribunal made very brief mention of Article 8 in paragraph 12. The First-tier Tribunal Judge noted the appellant's presence here since 2007 and found that he had completed his studies. He observed that the appellant could return to Pakistan to secure employment there. There is no mention of Article 8 in the determination promulgated in the Upper Tribunal in early June 2013.

25. Mr Duffy drew attention to the recent judgment of the Supreme Court in Patel and Others [2013] UKSC 72, and guidance which was taken into account by the Upper Tribunal in the second decision in Nasim and Others. 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, 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). There is no reason to doubt, in the present appeal, that the appellant may very well have formed friendships since his arrival here as a student in 2007. He has, however, always had limited leave and I have no doubt that he has been well aware of that fact. There is little detail of any particular friendships or associations and nothing to show that those ties he has established as a student, and following his post-study work application, cannot be maintained from abroad. The appellant has succeeded in obtaining academic qualifications, has failed in his attempt to secure post-study work leave and there is, as yet, no lawful removal decision made by the Secretary of State. Overall, I find that Article 8 is engaged in the private life context, particularly in the light of the years the appellant has spent here. The adverse decision which remains to be considered was made in accordance with the law. So far as proportionality is concerned, in weighing the competing interests, I find that there is rather little to place in the balance on the appellant's side, taking into account the paucity of evidence and, on the other side of the balance, little of substance to set against the Secretary of State's case. I conclude that the decision to refuse to vary leave, and the appellant's removal in 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.

26. On 27th March 2014, the appellant's solicitors wrote to the Upper Tribunal, enclosing their client's authority to withdraw his appeal. Rule 17 of the Tribunal Procedure (Upper Tribunal) Rules 2008 provides that a party may give notice of withdrawal "at any time before a hearing to consider the disposal of the proceedings … or … orally at a hearing." The appellant may not now withdraw his appeal as the hearing has taken place.

Decision

27. 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.

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

FEE AWARD

I have considered whether a fee award should be made. As the appeal against the decision to refuse to vary leave and on human rights grounds has been dismissed, I make no fee award even though the appeal against the section 47 removal decision has been allowed.

Signed Date

Deputy Upper Tribunal Judge R C Campbell