Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/22047/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 25th February 2014	**On 5th March 2014**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MD SAIFUL AZAM

Respondent

Representation:

For the Appellant: Mr G Saunders, Senior Presenting Officer
For the Respondent: Mr Azam in person

DETERMINATION AND REASONS

1. The Respondent is a national of Bangladesh who was born on 30th June 1981. He had first entered the United Kingdom on 19th July 2004 with leave as a student and had subsequently been granted leave to remain as a student thereafter until September

2009. On 4th September 2009 he was granted further leave to remain as a Tier 4 (General) Student until 31st July 2010. He was granted further leave to remain in this category until 13th May 2012.

2. On 5th April 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 28th 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.

3. The basis upon which the Secretary of State refused his application was that on the basis of the documents that he had provided for the date of award under Appendix A of the Immigration Rules did not demonstrate that he qualified for the points in this area. Furthermore he was not entitled to 20 points for qualification under Appendix A of the Immigration Rules from the evidence provided as he had not provided the results of his dissertation. It was noted in the decision that as the Immigration Rules stated that the date of the award must be within twelve months directly prior to the date of the application, the Respondent was not awarded points in that area. The claimed points under Appendix B English language were refused due to the failure to meet the requirements for the eligible award.

4. Mr Azam appealed that decision and it came before the First-tier Tribunal (Judge Ross) sitting at Hatton Cross on 26th November 2012. In a determination promulgated on 4th December 2012 and having heard the evidence of the Respondent, he allowed the appeal to the extent that it was remitted to the Respondent as not being in accordance with the law. In that determination he recited the account given by Mr Azam that his course had ended on 3rd February 2012 and that the evidence confirmed that he was still awaiting the results of his dissertation. It further recorded at paragraph 3 that the university did not inform him that he had been awarded the degree until 16th May 2012 and the degree was issued or awarded on 31st May 2012. Mr Azam had explained before the judge that he had not sent the Secretary of State the documentation concerning the date of his award because he had received a letter on behalf of UKBA dated 18th May 2012 which had expressly told him not to send documents unless requested to do so. The judge considered the decision of the Court of Appeal in **AQ v SSHD [2011] EWCA Civ 833** but found that that could not assist the Respondent. However he considered that there was a general duty on the Secretary of State to act fairly and that Mr Azam had failed to notify the UKBA of the fact that he had obtained his degree before the decision was made in September because of the letter which had been written him telling him not to send documents to the UKBA unless requested. Thus the judge recorded at paragraph 11 that he considered that the caseworker should have enquired whether the degree had been awarded before making the decision and if that had been done "no doubt the Secretary of State would have allowed the Appellant to amend his application by submitting the additional evidence." Therefore he found the decision not to be in accordance with the law and remitted it to the Secretary of State.

5. In addition, in respect of the removal direction under Section 47 of the 2006 Act, the First-tier Tribunal Judge correctly identified that that was an unlawful decision and therefore found it was not in accordance with the law and remitted that matter to the

Secretary of State also. Following the promulgation of the determination, the Secretary of State sought permission to appeal and on 18th December 2012 permission was granted by First-tier Tribunal Judge Fisher.

6. Thus the appeal came before the Upper Tribunal (Deputy Upper Tribunal Judge Monson) on 26th March 2013. In a determination promulgated on 9th April 2013 he upheld the decision of the First-tier Tribunal. His analysis is set out at paragraphs 6 to 13 of the determination and whilst he found that Judge Ross had misdirected himself in law when referring to the decision of **AQ** (as cited) but 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. Therefore he considered that provided the Respondent 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. In this respect the findings made by the judge relating to issues of fairness namely that the letter of 18th May 2012 requesting the Respondent not to send any further documentation prevented Mr Azam from sending the eligible award that was made in May and therefore prior to the date of decision and because of that and delay emanating from the University of Wales, a matter for which he found the Secretary of State could not be responsible) he found the letter of 18th May 2012, relied upon by Judge Ross, was sufficient to establish unfairness. As the Deputy Judge said at paragraph 12 "It was unfair of the Secretary of State to refuse the application because essential evidence was missing, when the caseworker had expressly told the claimant not to send any additional documents unless requested to do so." He therefore found there was no error of law in the judge finding that the refusal to vary the claimant's leave was not in accordance with the law.

7. It was also recorded at paragraph 13 that the judge was right to find that Section 47 removal was unlawful but he was wrong to direct the question of removal should be remitted to the Secretary of State. Thus he upheld the determination save for the remittal on the question of removal which was set aside.

8. 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.

9. As set out in the decision of the Upper Tribunal in **Nasim and Others (Raju: reasons not to follow?) [2013] UKUT 00610(IAC)** at paragraphs 3–5, 200 applications for permission to appeal to the Court of Appeal were made by the 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**.

10. Since it was known that permission to appeal in **Khatel** had been granted (with arrangements made for the Court of Appeal to expedite the hearing in that court), it was considered appropriate to consider the Respondent's permission applications once the judgments of the Court of Appeal became known.

11. On 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 immigrants: **Raju and Others v SSHD [2013] EWCA Civ 754**.

12. 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."

13. 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**).

14. 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.
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> 2. The parties shall prepare for the forthcoming hearing in the Upper Tribunal on the basis that the issues to be considered at that hearing will be as follows:
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> (a) whether the determination of the Upper Tribunal, made by reference to the determination in **Khatel and Others (s85A; effect of continuing application) [2013] UKUT 00044 (IAC)**, should be set aside in light of the judgment of the Court of Appeal in **Raju and Others v Secretary of State for the Home Department [2013] EWCA Civ 754** (as to which, see **Nasim and Others (Raju: reasons not to follow?) [2013] UKUT 00610 (IAC)**);

(b) if so, whether there is an error of law in the determination of the First-tier Tribunal, such that the determination should be set aside; and

(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).

15. In compliance with those directions issued by the Upper Tribunal, further evidence and submissions were received by the Tribunal on behalf of the Respondent.

16. Thus the appeal was listed before the Upper Tribunal. Mr Azam appeared in person and had with him the papers that had been provided before the First-tier Tribunal and the Upper Tribunal. The Secretary of State was represented by Mr Saunders, Senior Presenting Officer. Mr Saunders submitted that the decision of the Upper Tribunal should be set aside relying on the decision of the Court of Appeal in **Raju and Others** (as cited). Contrary to the submissions made in the written documents, the Upper Tribunal was wrong in law by relying on the decision in **Khatel**. The point raised about unfairness did not arise because the judge considered it in the context of **Khatel** which has subsequently been overturned by the decision in **Raju**. In those circumstances it did not matter when Mr Azam had sent the information (whether it was in May or later) because at the date of the application there had been no award. He further submitted that the Section 47 decision was unlawful and in those circumstances the decision of the Upper Tribunal was correct.

17. Mr Azam made his oral submissions to the Tribunal. He submitted that the decision of the Upper Tribunal did not solely rely on **Khatel** and in those circumstances the decision of **Raju** should not affect the outcome. He submitted that there was no error of law in the decision of the Upper Tribunal and that it relied upon the general duty on the Secretary of State to act fairly. There was unfairness in this case as demonstrated by the facts. He stated that he had submitted evidence of other students in a similar situation whose appeals were allowed and others who were refused and that this demonstrated inconsistent decision-making. In this respect he relied upon a letter in his bundle at C4 dated 3rd September 2012; a letter relating to another Appellant and not Mr Azam from an account manager employed by the UKBA and also a letter from the Right Honourable Stephen Timms MP dated 6th October 2012. Such evidence he submitted demonstrated inconsistent decision-making. He further relied upon a policy guidance document at A2 that was headed "Alvi Guidance". He stated that he met the criteria and therefore should have been awarded the points. He submitted further that there was a systemic failure and that it was not a "one-off" and that it should be taken into account.

18. He further made the point relying on the decision of the Court of Appeal in **ML (Nigeria)** that a series of material factual errors can constitute an error of law and that should be resolved in favour of the Appellant. He stated that this was relevant

because in respect of the decision letter he had provided documents from the institution of studies for which he should have received 20 points but that had not been set out in the decision letter. He therefore invited the Tribunal to remit the decision to the Secretary of State and that even if the decision was wrong in law the decision because it was an unfair one should be sent back to the Secretary of State as it was not in accordance with the law.

19. As to Article 8, he said that he had been in the United Kingdom since 2004 as a student and he was now 33 years of age and therefore at the date of this hearing had been in the UK nearly ten years. He said that he had studied for two qualifications including his MBA, he had never committed any crime and was not a threat to society and had supported himself without relying on public funding. He said he had no family in the United Kingdom but he knows more people in the UK than he does in his home country of Bangladesh. He stated that he intended to settle in the UK.

20. Mr Saunders by way of reply submitted that the letter from the MP setting out the names of people who had been allowed and those who had been refused did not give details of their particular cases and there was no way of establishing the basis upon which those applicants had been allowed or refused therefore it was not of any assistance in demonstrating inconsistent decision-making. Also the document at C1 had no reply with it and therefore had no evidential value. In respect of Article 8, the Appellant had not raised this before the First-tier Tribunal and there had been no compliance with the directions. Nonetheless in the Upper Tribunal decision of **Nasim** and the decision in **Patel** applying those decisions, the Appellant could not succeed under Article 8 and it would not be a disproportionate removal on the facts of his appeal.

21. Mr Azam sought to address the Tribunal again. He submitted that the letter had been sent to the Home Office and that if there had been any issue arising out of that, they would have been in the position to clarify it.

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

Conclusions

23. I have carefully considered the competing submissions made by the parties and the documentation relied upon. The first ground advanced by Mr Azam is that this Tribunal should not set aside the decision of Deputy Upper Tribunal Judge Monson because the decision of **Raju** does not affect the decision properly reached by him. He submits that the judge allowed the appeal not on **Khatel** grounds but on grounds of fairness. To consider that submission it is necessary to consider what the Upper Tribunal said at paragraphs 6 to 12. The Tribunal said this:-

> "6.Although the Secretary of State was granted permission to appeal, the rationale of Judge Fisher's grant of permission favours the claimant, rather than the Secretary of State. For the logical outcome of Judge Fisher's reasoning is that Judge Ross ought to have allowed the claimant's appeal under the Immigration Rules, rather than simply finding that the refusal decision was not in accordance with the law, and that a lawful decision on the application remained outstanding.

7. In the light 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 UKBA. As **AQ** indicated, and as **Khatel** confirms, an application under the points-based system is deemed to be a continuing one until the date of decision. So provided the claimant (a) obtained his degree before the date of decision, and (b) provided evidence of this to the Secretary of State before the date of decision, the award should be taken into account.

8. While Judge Ross misdirected himself on the ramifications of **AQ**, he correctly identified a fatal deficiency in the claimant's application, which was that he failed to notify the UK Border Agency of the fact that he had passed his dissertation, and had thereby obtained his degree, before the decision was made. So the decision in **Khatel** does not salvage the claimant's position under the Immigration Rules.

9. The Secretary of State attacks the judge's finding on fairness on the ground that the judge erred in speculating that UKBA would be aware of delays on the part of the University of Wales. Delays emanating from the University of Wales were not a matter for which the Secretary of State was responsible. In the Tribunal cases cited in judge's determination, the issue of fairness arose as a result of the Secretary of State's actions placing applicants in positions where they were materially disadvantaged through no fault of their own.

10. If this had been the judge's only reason for finding unfairness, the challenge would have some merit. But the judge also places weight on a letter from the UK Border Agency dated 18 May 2012 which was sent to the claimant in response to his application. The letter thanks him for his recent application, and continues as follows:

Please do not send any additional documents to us unless requested to do so by a caseworker.

11. The claimant gave evidence that the reason why he did not submit to UKBA the results of his dissertation, or evidence of the degree certificate that had been awarded to him consequential upon the successful completion of his dissertation, was because of the terms of this letter. He had been told not to send any additional documents unless requested to do so by a caseworker, and he obeyed this instruction. No caseworker had approached him between the time of his application and the date of decision asking him to provide the evidence which was said to be lacking in the refusal decision.

12. Even without the extra dimension of there being a problem with delays on the part of the University of Wales in issuing degree certificates, the express instruction to the claimant in the letter of 18 May 2012 is sufficient to establish unfairness. It was unfair of the Secretary of State to refuse the application because essential evidence was missing, when the caseworker had expressly told the claimant not to send any additional documents unless requested to do so. So there was no error of law in the judge finding that the refusal to vary the claimant's leave was not in accordance with the law.

13. The judge was also right to find that the Section 47 removal decision was unlawful. In the light of **Adamally and Jaferi**, he was wrong to direct that the question of removal should be remitted to the Secretary of State for further consideration. This is the only respect in which his decision requires adjustment. The Tribunal held at paragraph 25 as follows:

> At the end of the day, the result should be that the Tribunal determines in substance the appeal brought against the lawful decision, and declares the other decision unlawful. The Secretary of State ought not to have made the s 47 decision, but, with the benefit of the Tribunal's decision on the merits of the refusal to vary, can decide whether that person should be subject to a removal decision. As to that, it appears to us that the Tribunal should not express any view. To dispose of the appeal in such a way as to suggest to the Secretary of State that a new removal direction ought to be made is, in our judgment, quite wrong. For that reason if no other, use of the word "remit" is not appropriate. "

24. In my judgment it is plain that the judge did apply the decision of **Khatel** by stating that the First-tier Tribunal Judge had been wrong to proceed on the basis that he had to have obtained the eligible award prior to the date that he lodged his application on 5th April 2012 and that provided the Appellant had obtained the degree before the date of decision in September and had provided evidence of this to the Secretary of State before the date of decision, the award could be taken into account. However the judge further noted that this did not assist Mr Azam because he had failed to notify UKBA that he had passed his dissertation and obtained the degree before the decision was made in September 2012. Contrary to the submission made by Mr Azam, it seems to me that the issue of fairness is directly linked to the point relied on by the judge in **Khatel** namely that the reason why the Respondent did not send the information concerning the dissertation prior to the decision was because he had sent a letter on 18th May 2012 asking him not to send such information. However in the light of the decision of **Raju** that does not assist this Respondent. The decision in **Raju** makes it plain that **Khatel** was wrong in law. The point in **Khatel** was that it was thought that making an application was a continuing process and as long as the necessary documents were put before the Secretary of State before she made her decision the requirement of the Rules were met. However as **Raju** confirmed and confirmed in the later decision of the Tribunal in **Nasim and Others** at paragraphs 20 to 21, the Immigration Rules require the applicant to have made the application for leave to remain "within twelve months of obtaining the relevant qualification" (Appendix A, Table 10, fourth section); and that paragraph 34G of the Rules when read with the fourth section at Table 10 created a substantive requirement with which the Appellants in **Khatel** could not comply and that fact that they had adduced evidence, prior to the date of decision that they had been notified of their awards, was of no avail. The date of "obtaining the relevant qualification" for the purposes of Table 10 of Appendix A to the Immigration Rules as in force immediately before 6th April 2012 is the date on which the university or other institution responsible for conferring the award (not the institution where the applicant physically studied if different) actually conferred that award, whether in person or in absentia.

25. The fact that he had not sent the documents prior to the date of decision in September due to the Respondent's letter of 18th May does not change the position that he was not awarded the eligible qualification in the twelve months preceding the application made on 5th April 2012. Thus the issue of fairness that arises from the letter sent by the Secretary of State simply does not arise.

26. Furthermore the fairness point relating to delays on the university's part was not given weight by the Upper Tribunal (see paragraph 10 of their decision) and it was the letter of 18th May 2012 which the judge considered was the matter upon which weight should be placed as set out at paragraph 12 where it was recorded "It was unfair of the Secretary of State to refuse the application because essential evidence was missing when the caseworker had expressly told the claimant not to send any additional documents unless requested to do so."

27. The letter from the MP appears to be stating that there had been delays in awarding degrees and that they were due to be awarded before the deadline of 5th April but were awarded in May. There is no information or further evidence filed by either party to support such a contention. Indeed in relation to the circumstances of this particular Respondent, the evidence contained in two letters of 20th March and 30th March make it clear that he had not received his dissertation results by 30th March it being in the process of being marked. The letter of 20th March 2012 made it clear that the dissertation had been submitted but was "currently being in the process of being marked" (see E1 of the Appellant's bundle). The letter of 30th March 2012 similarly stated that Mr Azam was awaiting the dissertation result. Thus there was no evidence that he was to be awarded his qualification within the twelve month period before 5th April 2012 as required by the Rules.

28. In respect of the fairness point raised by Mr Azam, the Tribunal in **Nasim** dealt with this issue. They said this:-

"(d) Fairness

38. The issue of fairness is closely allied to that of legitimate expectation and proportionality. The argument was advanced before the Court of Appeal in Raju, that there was no rationale for, on the one hand, awarding someone 20 points in respect of their qualification, whilst refusing to award that person 15 points because the date of the award was after 5 April 2012. This argument did not find favour with Moses LJ:-

> "[12] Whilst I acknowledge that to allow applications which anticipate the award of the necessary qualification does not undermine the purpose of the policy, the wording of the fourth section [of Table 10 in Appendix A] seems to me plain. The fact that an Applicant will achieve a score of 60 points, by obtaining a recognised degree at a qualifying institution during a lawful stay, achieves nothing. Only a score of 75 points attracts the right to be granted leave to remain. There is no room in the points-based scheme for a near miss. Viewed as a whole, qualification under Table 10 requires strict compliance with the requirement to make the application within the period of one to twelve months from the time when the qualification was obtained.
>
> [13] Read in that way, the Rules are analogous to those which require an applicant to satisfy a requirement at the date of his application, such as to require him to have a specified minimum level of personal savings at least three months prior to the date of the application (para 245AA) and to the Rules as to level of funds under the applicant's control on the date of the application under App C – maintenance (para 1A(g)). …"

29. For those reasons I have reached the conclusion that the Tribunal was wrong in law by upholding the First-tier Tribunal's decision on grounds of fairness and that the

decision discloses an error of approach and that as the law has now been clarified in **Raju**, that further demonstrates the Appellant could not meet the Immigration Rules for the reasons set out.

30. Any argument concerning evidential flexibility was similarly considered in the decision of **Nasim and Others** at paragraphs 38 to 41 and were rejected. As to evidential flexibility, the Tribunal for sound reasons rejected arguments concerning this at paragraphs 50 to 52 of their decision in **Nasim and Others**. As stated in **Raju** (at paragraph 24) "These applicants could not score 75 points because they had made their applications before they had obtained their qualifications." Therefore no application of the evidential flexibility policy could have assisted the Respondent on the facts of the appeal; a point that had been relied upon by the First-tier Tribunal.

31. The second argument advanced by Mr Azam relates to what has been described as "inconsistent decision-making" on the part of the Secretary of State. To this end he relies upon the letter of the Right Honourable Stephen Timms MP in which he sets out that named members of the group "whose circumstances were all apparently identical had their visas awarded" and gave the names of seven people who had been refused and a number who had been allowed. Mr Azam further relied upon a letter exhibited at C4 dated 3rd September 2012 sent by an account manager in respect of another person (not this Respondent) in which it was said that the late issuing would not affect his application.

32. The Tribunal in **Nasim (2)** dealt with the issue of inconsistent decision-making. As noted at paragraph 32, the Tribunal considered that the Appellants had not begun to make out their case in respect of inconsistent decision-making and at paragraph 34 found that the evidence did not demonstrate a systemic inconsistency in relevant decision-making by the Secretary of State. Whilst that was in the context of Article 8, the decision of the Upper Tribunal in **Nasim** applies in my judgment to the argument advanced by Mr Azam. As noted by the First-tier Tribunal Judge Ross at paragraph 10 in respect of the same letter, "I do not know the circumstances of these people but it may be they submitted their degree certificates to the UKBA before the decision was made." I would echo and adopt that point. There are no details given of the particular circumstances of any of the Appellants listed in that letter. There are no details as to why they succeeded and why others did not and it is not sufficient to say as Mr Azam has submitted that it was open to the Secretary of State to provide this information. As their circumstances are unknown and the documentation that was relevant to their particular circumstances has not been made available, I cannot find that the evidence demonstrates a systemic failure on the part of the Secretary of State as submitted by Mr Azam. In any event on the evidence in respect of this particular Respondent, and in particular the letter of 30th March makes it plain that the dissertation had still not been marked and therefore it cannot have been said that he would have been awarded his eligible qualification before the date of the application made on 5th April.

33. Insofar as Mr Azam relied upon **ML (Nigeria)** on the basis that factual errors can constitute an error of law, whilst that is a correct statement of law, I do not find that has any bearing on the facts of this appeal. Even if he could demonstrate documentary compliance with other parts of the relevant Rule, it is plain that he

could not have been awarded the 15 points necessary to meet the overall figure of 75 points required by the Rules because he had not demonstrated the eligible award as noted by the Secretary of State. As to his argument relating to policy guidance, I do not find that this avails him either. The point made in **Raju** was that it was not the guidance but the Immigration Rules themselves that the Appellants could not meet. On the facts of the present appeal Mr Azam has not been able to demonstrate that he could have met the Immigration Rules for the reasons set out in the preceding paragraphs.

34. In those circumstances and for the reasons set out I am satisfied that upon reviewing the decision of the Upper Tribunal it was flawed in law and therefore should be set aside.

35. I am now required to consider the decision of the First-tier Tribunal. It is plain from the preceding paragraphs that the decision of the Upper Tribunal in effect upheld the decision of the First-tier Tribunal. It therefore follows from my analysis set out above that for the same reasons the First-tier Tribunal erred in law and that the judge should not have allowed the appeal either outright (as the Upper Tribunal contended it should have been) or remitting the decision to the Secretary of State. There were no grounds to remit the decision as being not in accordance with the law on the grounds that it was not in accordance with the law based on arguments of fairness. On applying the law as it is now known in **Raju** and in the Upper Tribunal's decision in **Nasim**, the decision of the First-tier Tribunal discloses an error of law in its approach to the Immigration Rules and therefore I set aside that decision.

36. In remaking that decision I have had regard to the grounds now raised by Mr Azam under Article 8 of the ECHR. In his Grounds of Appeal to the Tribunal originally following the refusal of his application he stated, "The decision is unlawful as it is incompatible with the rights under the ECHR." No other information or evidence was given in this respect in the Grounds of Appeal before the First-tier Tribunal or before the Upper Tribunal. The First-tier Tribunal did not deal with Article 8. It is further right to record that despite the directions issued by the Upper Tribunal concerning evidence relied upon relating to Article 8 grounds, no evidence was sent by the Respondent to comply with those directions. Nor in the written submissions made by Mr Azam does he set out any claim made under Article 8. Nonetheless I have taken into account the oral submissions made that he has been present in the UK since 2004 as a student and that he has studied for two qualifications during this period of time, he has not committed any criminal offences and has supported himself without recourse to public funds. He confirmed he had no family in the United Kingdom but that he wished to settle in the UK.

37. Insofar as the Article 8 claim is now advanced, I would accept that he has established a private life having been in the UK since 2004. The nature of that private life has not been evidenced save that he has been studying in the United Kingdom, which is demonstrated by the facts of this appeal. The Upper Tribunal in **Nasim (2)** dealt with the issue of Article 8 matters. At paragraph 15 the Tribunal cites the decision of **CDS (Brazil) [2010] UKUT 305**. It was noted at paragraph 40 of **Nasim** that **CDS** has no material bearing as that case involved the interpretation of Immigration Rules rather than the effect of changes in such Rules. Furthermore, the Appellant in **CDS** was

faced with a hypothetical removal, which would have prevented her from completing the course of study for which she had been granted leave. In the case of this Respondent, he has finished the course for which he was granted leave to remain and seeks to undertake two years' post-study work. In those circumstances he can be distinguished from the Appellant in **CDS (Brazil)**. Furthermore the Tribunal did expressly acknowledge that it was unlikely that a person would be able to show an Article 8 right by coming to the United Kingdom for temporary purposes, for example as a student as this Respondent has. Such a submission is diminished further in light of the judgment in **Patel and Others** (see paragraph 41 of **Nasim and Others**). The fact that he had been granted entry clearance for temporary purposes does not provide any basis or legitimate expectation to settle in the United Kingdom. Therefore whilst Article 8 is engaged, I would not find that it has been demonstrated that such removal would be disproportionate but would be proportionate to the legitimate end, namely the operation of a coherent and fair system of immigration control. Accordingly, for those reasons I do not find that there is any disproportionate interference with his Article 8 rights adopting the reasoning in **Nasim and Others** and therefore the appeal is dismissed on human rights grounds.

Decision

38. The decision of the Upper Tribunal (Deputy Judge Monson) is set aside.

39. The determination of the First-tier Tribunal (Judge Ross) involves the making of an error on a point of law and is set aside. I remake the appeal against the immigration decision of 28th 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