Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/23407/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 31 March 2014	**On 4 April 2014**

Before

UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MUDASAR RAUF

Respondent

Representation:

For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Ms S Nasim, Solicitor of Lee Valley Solicitors

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge NNM Paul, who sitting at Taylor House on 5 December 2012 and in a subsequent determination promulgated on 10 December 2012, allowed the appeal of the Respondent (hereinafter called the Claimant) a citizen of Pakistan born on 24 July

1984, against the decision of the Secretary of State refusing his application for leave to remain in the United Kingdom as a Tier 1 (Post-Study Work) Migrant. The Secretary of State's application for permission to appeal was granted by Upper Tribunal Judge Allen who considered the grounds to have "clearly arguable merit."

2. It would be as well to set out below the Secretary of State's grounds:

> "**Ground 1**: Material Misdirection of Law – Fixed Historic Timeline
>
> The Judge has misunderstood the reasoning in AQ (Pakistan) [2011] EWCA Civ 833. AQ continues to distinguish between Rules which require a fixed historic timeline and those that do not have a fixed historic timeline. Applications under a Rule with an historic timeline must meet the requirements of the Rules at the relevant timeline 'cut-off' point, usually the date of application. Applications without such a timeline must meet the Rules at the date of decision.
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> Immigration Rule 245FE and Appendix A Table 10 paragraph 66 to 72 do provide a fixed historic timeline. For 15 points, Appendix A Table 10 does employ a fixed timeline for the application to be made within twelve months of obtaining the award. This appears in the context of the rest of Table 10 to limit consideration to degrees obtained before the application was made.
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> **Ground Two**: Material Misdirection of law and/or failure to adequately reason a departure from S85A
>
> The Judge erred in taking into account evidence which was not submitted in support of, or at the time of making, a PBS application. The Tribunal is prevented from doing this by the Nationality, Asylum Immigration Act 2002 S85A.
>
> The Secretary of State seeks the setting aside of the FTT determination and a further decision on the appeal under the correct legal principles."

3. In his determination the First-tier Judge noted that the Claimant had claimed 15 points in relation to the date of obtaining the eligible award under Appendix A of the Rules and that the Secretary of State was not satisfied that the Claimant had provided the specified documents. As noted by the Judge at paragraphs 2 and 3 of his determination:

> "2. The reason for this was that the (Claimant) had claimed points on the basis that he had been awarded his eligible qualification no more than 12 months before the date of the application. The application was made on 5 April 2012. However, the award relied upon had been granted on 25 May 2012 and therefore postdated the date of the application.
>
> 3. It was said, following the case of NO (Post-Study Work-Award) needed by date of application) Nigeria that the Immigration Rules required that the date of award must be within twelve months directly prior to the date of application."

4. The Judge noted at paragraph 4 of his determination,that the Claimant's representative relied on the judgment in AQ in particular at paragraph 36 who had submitted that:

> "It was plain, following the concession made by the Secretary of State, that the relevant date for the assessment of evidence is the date of the SSHD's decision and not (as may appear from earlier Tribunal decisions) the date of the application. It followed from that that the Court was satisfied that the question to be considered was whether the points had been accumulated at the time of the SSHD's decision."

5. The Judge continued:

> "This would, of course, include the requirement that the relevant degree had been awarded. The application was therefore a continuing application up and until the stated decision and the points to be accumulated were therefore to be assessed at the date of the decision."

6. The Judge thus concluded at paragraph 5 as follows:

> "It is plain, from the decision in AQ, that the relevant date to be considered is the date of the decision, and it is plain then that the award had been made within twelve months of that decision. It follows, therefore, that the appeal must be allowed."

7. Thus the appeal came before me on 31 March 2014 where my first task was to decide whether the determination of the First-tier Judge disclosed an error or errors on a point of law such as may have materially affected the outcome of the appeal.

8. At the outset of the hearing I received from Mr Melvin his written submissions and given that he relied on the grounds of application and those submissions in support of his appeal, it would be as well if I set them out below:

> "Mr Rauf was granted leave to enter as a Tier 4 (General Student), the UK on 15 January 2011. On 5 April 2012 Mr Rauf applied for further leave to remain as a Tier 1 (Post-Study Work) (PSW) Migrant. This application was refused on 17 September 2012 the Respondent not being satisfied that Mr Rauf met the requirements of the Immigration Rules 245FD(c) and (d) as his eligible award (Masters in Business Administration) was made on 25 May 2012 some eight weeks after his application, thus the application failed under Appendix A: Attributes, where the Rule requires the (educational) award to be made within twelve months **directly prior** to application (to be awarded 15 points).
>
> The Appellant appealed against this decision and his appeal was heard on 5 December 2012 by First-tier Tribunal Judge Paul at Taylor House, Mr Rauf being represented at that hearing. In a determination promulgated on 10 December 2012, Judge Paul allowed the Appellant's appeal under the Immigration Rules. The Respondent made an application for permission to appeal the decision which was refused by First-tier Tribunal Judge Chambers on 4 January 2013. The Respondent renewed his application

to the Upper Tribunal on 21 January 2014 and was granted by Upper Tribunal Judge Allen (to extended time given the circumstances) on 20 February 2014.

Reliance will be placed on the application for permission to appeal the decision.

In addition to those grounds, reliance will also be placed on the Court of Appeal decision in **Raju and Others EWCA Civ 754 [2013]** where the Court overturned the decision in **Khatel and Others UKUT 44 IAC [2013]**. As this Appellant's situation is squarely on all fours with the decision in **Raju**, it is submitted that the FTT, where **Khatel** was relied upon materially misdirected themselves in law. Reliance is also placed on the two recent Upper Tribunal decisions in **Nassim and Others (Raju) UKUT 610 UKUT [2013]** and **Nassim and Others (Article 8) UKUT 00025 [2014]** where after considering the Supreme Court decision in **Patel and Others UKSC 72 [2013]** held:

> *'The judgments of the Supreme Court in Patel and Others v Secretary of State for the Home Department [2013] UKSC 72 served to re-focus attention on the nature and purpose of Article 8 of the ECHR and, in particular, to recognise that Article's limited utility in private life cases that are far removed from the protection of an individual's moral and physical integrity.*
>
> *A person's human rights are not enhanced by not committing criminal offences or not relying on public funds. The only significance of such matters in cases concerning proposed or hypothetical removal from the United Kingdom is to preclude the Secretary of State from pointing to any public interest justifying removal, over and above the basic importance of maintaining a firm and coherent system of immigration control.'*

If the Upper Tribunal are to find an error of law in the decision of the FTT it will be submitted that the Upper Tribunal should proceed to a continuance hearing and determine the appeal. Given that there have been no further submission documents/evidence the Upper Tribunal is invited to consider the evidence before the First-tier Tribunal and find that the Immigration Rules cannot be met and the limited time spent by the Appellant in the UK studying/pursuing the appeal, does not reveal circumstances that engage Article 8(1). If the Tribunal is to find that private life is engaged it will be submitted that the decision is proportionate in the maintenance of a firm/fair system of immigration control.

The Upper Tribunal is invited to dismiss the appeal."

9. As Ms Nasim most helpfully and realistically acknowledged before me:

> "The authorities are before you and I would ask you to deal with the appeal as submitted by Mr Melvin. My hands are tied."

10. Ms Nasim did however explain to me that on the instructions of her client the Claimant, she wished to draw to the attention of the Tribunal the delay by the Secretary of State in dealing with the Claimant's application. Whilst she acknowledged that there had been no cross-appeal in terms of Article 8, she was instructed to submit that the effect of the dismissal of the Claimant's appeal would be to interrupt his educational progress. She however also acknowledged that as

pointed out by Mr Melvin in his written submissions, the Supreme Court in Patel and Others had made it unequivocally clear at paragraph 57 of their judgment that:

> "57. It is important to remember that Article 8 is not a general dispensing power. It is to be distinguished from the Secretary of State's discretion to allow leave to remain outside the Rules, which may be unrelated to any protected human right. The merits of a decision not to depart from the Rules are not reviewable on appeal: Section 86(6).
>
> **One may sympathise with Sedley LJ's call in *Pankina's* case [2011] QB 376 for 'common sense' in the application of the Rules to graduates who have been studying in the UK for some years: see para 46 above. However such considerations do not by themselves provide grounds of appeal under Article 8, which is concerned with private or family life, not education as such. The opportunity for a promising student to complete his course in this country, however desirable in general terms, is not in itself a right protected under Article 8**." (Emphasis added).

11. In Nassim and Others [2013] UKUT 00610 (IAC) it was held inter alia, that the date of 'obtaining the relevant qualification' for the purposes of Table 10 Appendix A to the Immigration Rules as in force immediately before 6 April 2012 was the date on which the university or other institution responsible for conferring the award actually conferred that award.

12. In the present case the Secretary of State in her decision pointed out that under paragraph 245FD, the date of the award had to be within the twelve months directly prior to the date of application and the Claimant's date of award was after this date.

13. Indeed as Mr Melvin rightly pointed out in his oral submissions before me, the Claimant's application was made on 6 April 2012, before the closure of the Tier 1 window and the Secretary of State's decision was not made until 15 December 2012. The Claimant had to be awarded points as at the date of application. There was in fact an eight week gap between the date of application and the Claimant's MBA award and therefore in light of the regulations, the Claimant's appeal should have been seen to be doomed to fail.

14. At the date of the Claimant's application Table A under "Attributes"was clear that the Claimant had to make the application "within twelve months of obtaining the relevant qualification ..." As held by the Supreme Court in Mahad UKSC 16 [2009] the Rules had to be interpreted on their plain meaning and in this case the requirement of the relevant Rule simply could not have been clearer.

15. Further and as was held in Raju [2013] EWCA Civ 754, the language used in the fourth section of the table, that set out the "Attributes" required to qualify under the Tier 1 (Post-Study Work) Scheme had to be construed in the context of the Table as a whole and the function that it served in the administration of immigration policy (see

again Mahad). Further, there was no room in the points-based system for a near miss. Viewed as a whole, qualification under Table 10 required strict compliance.

16. I find that it is therefore clear that as submitted by the Secretary of State and for the above reasons, the First-tier Judge clearly and materially erred in law such that his decision must be set aside.

Conclusions

17. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

18. I set aside the decision.

19. For the reasons to which I have above referred, I re-make the decision in the appeal by dismissing it.

Signed Date 2 April 2014

Upper Tribunal Judge Goldstein