Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/21625/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 25th February 2014	**On 27th February 2014**
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Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SUNIL CHAND

Respondent

Representation:

For the Appellant: Mr G. Saunders (Senior Presenting Officer)
For the Respondent: No appearance and no representation

DETERMINATION AND REASONS

1. Mr Sunil Chand is a national of India born on 19th April 1986. He was granted leave to enter the UK as a Tier 4 (General) student on 5th April 2011 until the 27th May 2012.

2. On 5th April 2012 he applied for leave to remain in the United Kingdom as a Tier 1 (post-Study) Migrant but his application was refused by the Secretary of State on 24th September 2012 under Paragraph 245FD and a decision to remove was made under Section 47 of the Immigration, Asylum and Nationality Act 2006.

3. The relevant rule, paragraph 245FD reads as follows:-

> "To qualify for leave to remain as a Tier 1 (Post-Study Work) Migrant, an Applicant must meet the requirements listed below. Subject to paragraph 245FE(a)(i), if the Applicant meets these requirements, leave to remain will be granted. If the Applicant does not meet these requirements, the application will be refused.
>
> Requirements:
>
> (a) The Applicant must not fall for refusal under the general grounds of refusal, and must not be an illegal entrant.
>
> (b) The Applicant must not previously have been granted entry clearance or leave to remain as a Tier 1 (Post-Study Work) Migrant.
>
> (c) The Applicant must have a minimum of 75 points under paragraph 66-72 of Appendix A."

4. Paragraphs 66 to 72 of Appendix A were as follows:-

> "ATTRIBUTES FOR TIER 1 (POST-STUDY WORK) MIGRANTS
>
> 66. An Applicant for entry clearance or leave to remain as a Tier 1 (Post-Study Work) Migrant must score 75 points for attributes.
>
> 67. Available points are shown in Table 10.
>
> 68. Notes to accompany the table appear below the table.

Table 10

Qualifications	Points
The Applicant has been awarded: (a) a UK recognised bachelor or postgraduate degree, or (b) a UK postgraduate certificate in education or Professional Graduate Diploma of Education, or (c) a Higher National Diploma ('HND') from a Scottish institution	20
(a) The Applicant studied for his award at a UK institution that is a UK recognised or listed body, or which holds a sponsor licence under Tier 4 of the Points Based System, or (b) If the Applicant is claiming points for having been awarded a Higher National diploma from a Scottish Institution, he studied for that diploma at a Scottish publicly funded	20

institution of further or higher education, or a Scottish bona fide private education institution which maintains satisfactory records of enrolment and attendance. The Scottish institution must: (i) be on the list of Education and Training Providers list on the Department of Business, Innovation and Skills website, or (ii) hold a Sponsor licence under Tier 4 of the Points Based System.	
The Applicant's period of UK study and/or research towards his eligible award were undertaken whilst he had entry clearance, leave to enter or leave to remain in the UK that was not subject to a restriction preventing him from undertaking a course of study and/or research.	20
The Applicant made the application for entry clearance or leave to remain as a Tier 1 (Post-Study Work) Migrant within 12 months of obtaining the relevant qualification or within 12 months of completing a United Kingdom Foundation Programme Office affiliated Foundation Programme as a postgraduate doctor or dentist.	15
The Applicant is applying for leave to remain and has, or was last granted, leave as a Participant in the International Graduates Scheme (or its predecessor, the Science and engineering Graduates Scheme) or as a Participant in the Fresh Talent: Working in Scotland Scheme.	75

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."

5. The Secretary of State refused the appeal in a decision dated 24th September 2012. The basis for refusal for the respondent was that he had made his application under Tier 1 on 5th April 2012 however from verifying the date of award with the University of Northampton they have confirmed the date of the award was the 23rd July 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.

6. He exercised his right to appeal that decision and his appeal was dismissed by the First-tier Tribunal (Judge Jackson) in a determination promulgated on 18th December 2012. He set out his findings at paragraphs 18-23 distinguishing the decision of **AQ (Pakistan) v Secretary of State [2011] EWCA Civ 833**, noting that **AQ** was decided prior to the commencement of Section 85A of the 2002 Act and applying **Ali (s120-PBS) [2012] UKUT 386** held that the conclusion in relation to the material date of the evidence in **AQ** does not apply to Section 85A cases 9 see paragraph 21). The judge went on to state that

> "There is now a clear statutory framework which specifically precludes the consideration of pot-application evidence in PBS cases and the critical date in such cases is the date of the application, not the date of the Respondent's decision on such an application. As above, at the date of the application, the Appellant had not been awarded his degree and therefore he could not satisfy the requirements of Appendix Appellant (nor therefore paragraph 245FD(c) or (d) of the Immigration Rules) even though his degree had been awarded before the respondent's decision."

7. The judge also dealt with arguments of fairness at paragraphs 22 and Article 8 at paragraph 23. He dismissed the appeal on all grounds.

8. He did not deal with the their appeals against removal decisions made in respect of them, in purported pursuance of Section 47 of the Immigration, Asylum and Nationality Act 2006.

9. Mr Chand sought permission to appeal the decision and permission was refused by Designated Judge Bowen on 22nd January 2013. Permission was granted by Upper Tribunal Macleman on 25th February 2013. The appeal came before the Upper Tribunal (Upper Tribunal Judge Jordan), and Mr Chand's appeal was allowed in respect of his appeal against the decision of the Secretary of State to refuse to vary leave to remain in the United Kingdom, because the Tribunal followed the approach adopted by Blake J, President and Upper Tribunal Judge Coker in **Khatel and Others (s85A; effect of continuing application) [2013] UKUT 00044 (IAC)**.

10. 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 **Khatel**. The grounds of application reiterated the critique of **Khatel** contained in the grounds of application submitted in that case.

11. 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**.

12. 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.

13. 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**.

14. As a result, the Tribunal gave directions in the cases before it where the Secretary of State 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—
>
> …
>
> (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."

15. 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**).

16. 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)."

17. On consideration of the file, no further evidence or submissions were received by the Tribunal from Mr Chand in respect of the directions issued on the 21st January 2014.

18. Thus the appeals were listed before the Upper Tribunal. There was neither appearance nor representation on behalf of the respondent. Notice of Hearing was sent with the directions on 27th January 2014 to the address notified to the Tribunal and the address held by the Secretary of State. I am satisfied that there was good service under the Rules and pursuant to Rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) I considered that I should hear the appeal in the absence of the respondent.

19. Mr Saunders invited the Tribunal to set aside the decision of the Upper Tribunal relying on the grounds dated 16th May 2013 and relying upon the decision of the Court of Appeal in **Raju and others** (as cited). He submitted that the decision in **Raju** demonstrated that the decision of **Khatel**, relied on by the Upper Tribunal was wrong in law and that the facts set out in the determination, of which there was no dispute, demonstrated that the Respondent could not meet the Immigration Rules and therefore the decision should be set aside.

20. As to the decision of the First-tier Tribunal, it was accepted there was an error of law in that the judge did not deal with the Section 47 removal which was accepted as unlawful but in all other respects the decision of the First-tier Tribunal should be upheld for the same reasons given for reaching the conclusion that the decision of the Upper Tribunal was wrong in law. The judge correctly identified that the Respondent could not meet the Immigration Rules for the reasons set out in the determination. As to Article 8, it was open to the judge to make those findings that he did and applying the decision of **Nasim and others (Article 8)** demonstrated that the Appellant could not show that the decision was a disproportionate interference with his family or private life, irrespective of his marriage, which had not been evidenced or substantiated in any way save for the marriage certificate.

21. I reserved my decision at the conclusion of the submissions.

22. I have given consideration to the evidence before me and having done so, I am satisfied that the Upper Tribunal determination of 8th May 2013 must be set aside for the reasons advanced by Mr Saunders, who relied upon the grounds originally

submitted and supported by the Court of Appeal decision in **Raju and others** and also the Upper Tribunal decision of **Nasim and others** (cited).

23. There is no dispute as to the facts of this appeal. The application for leave to remain was made on 5th April 2012 but his qualification was not awarded until 23rd July 2012. However, the decision in **Raju** makes it clear that **Khatel** is 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 set out in **Raju** and confirmed in the decision of **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 the 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. In this case the confirmation of the award was on the 23rd July 2012.

24. For those reasons and having carried out a review under Rule 45, I have reached the conclusion that the decision of the Upper Tribunal should be set aside .

25. I now am required to consider the decision of the First-tier Tribunal (Judge Jackson). I am further satisfied that the decision of the First-tier Tribunal in dealing with the decision under the Immigration Rules and on human rights grounds did not disclose an error of law but it is common ground that he did not deal with Section 47 removal decision and it is accepted that that was unlawful and therefore the respondent should succeed on this part of the appeal only as not being in accordance with the law. The judge in the determination at paragraph 18 considered the Respondent's submission and his primary argument that he had met the Immigration Rules at the time and that he had passed all of the examinations but that due to errors by the university he did not receive his certificate until 23rd July 2012. However as the judge noted this was not supported by the evidence. The email on 28th March 2012 from his tutor stated that he confirmed the Appellant had completed all parts of the course but went on to state:-

> "… the student will already have the results achieved from his results letter… you can write a reference to confirm the grades awarded, … what we cannot say is the MBA has been awarded because it hasn't yet."

Thus the qualification had not been awarded and was not notified in writing to the Appellant that it had been. The judge also found at paragraph 19 that the letter from the University of Northampton dated 2nd April 2012 confirmed that the Appellant

had approved past grades for all but the final 10 credits required for the award of his MBA. The final 10 credits' work had been provisionally awarded a pass grade but that would need to be internally moderated by the university and confirmed by an external examiner before being presented to the examination board in July. The author expected that the examination board would award the Appellant an MBA. It is recorded that the Appellant's own witness statement confirms the same view. The letter is also clear that the qualification had not yet been awarded, although it was likely that this would happen in July 2012.

26. At paragraph 20 of the determination the judge went on to state

> "The Appellant had not been awarded his degree by the University of Northampton until 23rd July 2012, which was after his application for further leave to remain. The Appellant did not therefore satisfy the requirements of Appendix A for the full award of points in that category at the date of his application."

27. He went on to state at paragraph 21 that at the date of the application he had not been awarded his degree and could not satisfy the requirements of Appendix A (nor therefore paragraph 245FD(c) or (d) of the Immigration Rules even though his degree had been awarded before the Respondent's decision.

28. The judge did not have the benefit of the decisions of the Upper Tribunal and the Court of Appeal but nonetheless those findings are consistent with the law as it now has been stated in **Raju and others** and demonstrates that the Appellant could not meet the Immigration Rules.

29. The judge also dealt with the issue of fairness even though no submissions were made in this regard on behalf of the Respondent at the hearing before the First-tier Tribunal. The judge's findings which are set out at paragraph 22 of the determination, considering the issue of fairness, are supported by the decisions in **Nasim and others** at paragraphs 38 to 41 and the Grounds of Appeal advanced by the Respondent against the decision of the First-tier Tribunal do not demonstrate that this approach was wrong in law. As the First-tier Tribunal Judge noted,

> "Given the findings in relation to the satisfaction of facts at the date of the application are that the route the Appellant wished to apply under had closed, allowing the Appellant, an opportunity to make further representations and to be told in advance the case against him would not have assisted. The Appellant knew that he had not been awarded his degree in time and the only course he can take in the circumstances is to seek redress against the university. This is not a case where the Respondent is required as a matter of fairness to do anything more."

That is entirely consistent with the decision of the Upper Tribunal in **Nasim and others**.

30. In respect of Article 8 the judge dealt with this at paragraph 23 stating as follows:-

> "In relation to Article 8, the Appellant has been in the United Kingdom since 5th February 2011 and studied for a year. It can be assumed that he has built up a limited

private life in that time but he has provided no evidence in relation to it. The Appellant in his statement says that he married Mrs Adili Bhatt on 5th November 2012 but that alone is insufficient to conclude that he has family life in the United Kingdom. The Appellant has given no evidence as to his relationship, he has not provided a copy of his marriage certificate, there is no statement from Mrs Bhatt and she was not present at the oral hearing to give evidence. In the circumstances, I cannot conclude that the Appellant has family or private life such as to engage Article 8 of the European Convention on Human Rights. In any event, no submissions were made in relation to Article 8 and there was no basis in the evidence on which I could find that the Appellant's removal from the United Kingdom would be a disproportionate interference with any private or family life that the Appellant could establish in the United Kingdom."

31. In the Grounds of Appeal against the First-tier Tribunal decision, the respondent submits that he had submitted evidence of his marriage to Adili Bhatt by providing a copy of the marriage certificate. There is indeed the certificate set out at page 39 which demonstrates that he married Adili Bhatt on 5th November 2012. There is a copy of her residence permit issued on 4th September 2012 as post-study leave. There is also a statement to her date stamped received 4th February 2013, which is after the First-tier Tribunal hearing. That witness statement sets out as follows:-

> "I further declare that we have a very strong family life and I'm afraid that his absence from the UK can disturb our life as I have no such family member or relative living in this country to look after me. We as a couple are happily spending marriage life here and also dependent to each other.
>
> I am also committed to be present in the next hearing with him. I further plea to the honourable court to allow his appeal as I won't be able to survive in this country alone without my husband, he is also my whole family as well. …"

32. There were no further details concerning the relationship, no further evidence relating to the nature of the private life that he states he has in the United Kingdom and no further matters concerning the factual basis of any Article 8 family life claim advanced on behalf of the Respondent. His wife did not attend before the First-tier Tribunal neither has either party attended before this Tribunal or made any compliance with the directions issued.

33. Even if it can be said that the First-tier Tribunal Judge erred by failing to take into account the evidence of the marriage, the judge had very little evidence concerning the nature of the relationship as does this Tribunal. There is no evidence to demonstrate that she could not return to India with him so that their family life can resume there nor is there any evidence to support her claim that there is no-one in this country to look after her if he was to be removed nor is there any evidence to support the claim that it is necessary for anyone to look after her in any event bearing in mind she is an adult, and having entered the UK prior to the respondent.

34. The judge accepted that he was likely to have built up a limited private life since he had been in the United Kingdom but as the judge noted there was no evidence concerning the nature of that private life. At its highest he has been in the United

Kingdom since February 2011 and had undertaken some study. In the decision the judge reached the conclusion that he could find no evidence that the removal of the respondent would be a disproportionate interference with his Article 8 rights. I find that the judge's approach to Article 8 is consistent with that which is set out in **Nasim and others (Article 8)**. No arguable error of law can be shown in his decision in this respect. Such removal would be proportionate to the legitimate end, namely the operation of a coherent and fair system of immigration control.

35. As noted in the decision of **Nasim and Others**, when considering the obiter remarks of the Upper Tribunal in **CDS (Brazil)**, it was noted at paragraph 40 of **Nasim and Others** 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 given leave.

36. In the case of Mr Chand, he has finished his course for which leave to remain as a student related. In the present case the having finished his course seeks to undertake two years' post study work and is therefore different from the Appellants 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, as this respondent has. This has also been noted in the light of the judgment in **Patel and Others** (see paragraph 41 of **Nasim and Others**). Accordingly, for those reasons I adopt and agree with the decision of the First-tier Tribunal and do not find that there is any disproportionate interference with the respondent's Article 8 rights adopting the reasoning in **Nasim and Others** and therefore the appeal is to be dismissed on human rights grounds also.

Decision

The decision of Upper Tribunal Judge Jordan is set aside.

The decision of the First-tier Tribunal in respect of the Immigration Rules and on human rights grounds stands. The decision is remade as follows. The appeal against the removal decision is allowed to the extent that the decision is not in accordance with the law.

Signed Date

Upper Tribunal Judge Reeds