IA 01380 2013
IA 01384 2013
IA 01392 2013
IA 01395 2013

Upper Tribunal
(Immigration and Asylum Chamber)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 7/8/13	**On 8/8/13**

Before

UPPER TRIBUNAL JUDGE WARR

Between

SECRETARY OF STATE

Appellant

and

TALUKDER MOHAMMED ZAKIR HUSSAIN + 3

Respondents

Representation:

For the Appellant: Mr S Ouseley, Home Office Presenting Officer
For the Respondent: Mr T Ahmed (Universal Solicitors)

DETERMINATION AND REASONS

1. This is the appeal of the Secretary of State but for convenience I will refer to the original appellants, a family from Bangladesh, as the appellants herein. A reference to the appellant is a reference to the first named appellant.

2. The appellant was born on 11 December, 1967 and has been studying lawfully in the United Kingdom since June 2006. His wife was born on 10 November, 1977. They have a son born on 1 August, 1998 and a daughter born on 28 February, 2003.

3. On 30 August, 2011 the appellant applied for leave to remain as a Tier 4 student. On 3 April, 2012 the appellant applied to vary his application and applied for leave to remain as a Tier 1 (Post Study Work) migrant under the points based system.

4. On 28 May 2012 the University of Wales confirmed that the appellant had been successful in obtaining an MBA degree. The Secretary of State refused the application on 20 December, 2012 on the basis that the appellant's qualification post dated the application he had made.

5. The appellant appealed and his appeal came before First-tier Judge Aziz on 22 April, 2013. The judge noted that the appellant had completed his course but had not received his qualification. He observed that the Secretary of State had refused the application by relying upon *NO (Post-Study Work- award needed by date of application) Nigeria* [2009] UKAIT 00054 and that applying this case the tribunal would have had little scope to allow the appellant's appeal. However the judge applied *Khatel and others (Nepal)* [2013] UKUT 44 (IAC) and allowed the appeal finding that the appellant satisfied the requirements of paragraph 245FD of HC395, the remaining appellants being treated as his dependants under the rules.

6. The Secretary of State applied for permission to appeal and on 2 July, 2013 Upper Tribunal Judge Spencer granted permission to appeal in the light of the decision of the Court of Appeal in *Raju, Khatel and others v Secretary of State* [2013] EWCA Civ 754.

7. Judge Spencer noted that it was anticipated that if the decision was set aside the decision would be remade by dismissing the appeals under the immigration rules. The decision on human rights aspects would need to be made and he directed the parties to file a properly indexed and paginated bundle containing all of the material including witness statements and authorities upon which they intended to rely at the hearing within 21 days of the date of the decision.

8. There was no compliance by either side with these directions.

9. At the hearing Mr Ahmed submitted that the appellant's application did in fact comply with the immigration rules notwithstanding the decision of the Court of Appeal in *Raju*.

10. This was because the application form had been accompanied by a letter from the Birmingham Graduate School dated 28 March, 2012 stating that the appellant had completed his course and was expected to receive a certificate from the University of Wales shortly.

11. Mr Ahmed referred me to paragraph G5 of the application form where an option was given. The appellant could either include the original certificate of award or, if the original certificate of award had not been issued, he could tick the box to show that he had sent an original letter from the institution giving details of the awarding body, and confirmation that the certificate of award will be issued. He submitted

that the letter from the Birmingham Graduate School complied with the requirements of the box which had been ticked.

12. Mr Ouseley objected that the point had not been raised below and no notice of it had been given.

13. I put the matter back to enable Mr Ouseley to consider the position.

14. When the hearing resumed he submitted that the letter did not comply with the material requested under paragraph G5 of the form because it did not confirm that the certificate of award would be issued.

15. In respect of Article 8 again no material had been supplied as directed.

16. Mr Ahmed apologised and acknowledged that there had been no compliance with the directions. He was concerned that the family would be left in limbo once the appeal process had been concluded. While the Secretary of State would look at any article 8 or section 55 points the family would not be lawfully resident.

17. At the conclusion of the submissions I reserved my decision.

18. It is quite clear that the judge only allowed this appeal because of the Tribunal case of *Khatel*. Once that case had been overturned by the Court of Appeal the appellant had the opportunity to file a notice under paragraph 24 of the Upper Tribunal Procedure Rules raising any grounds that he wished to rely upon. Further the Upper Tribunal had issued directions as I have pointed out. There was not even a skeleton argument or bundle lodged at the hearing and no notice was given of the point now sought to be relied upon. I nevertheless thought it right to give Mr Ouseley the opportunity to consider it.

19. In my view the point should have been raised at the proper time. I am not moreover satisfied that the tick box at paragraph G5 authorises the submission and acceptance of post application material to justify the award of points in circumstances such as this given the very clear decision of the Court of Appeal in *Raju*. Subsequently obtained evidence cannot cure the defect in the application: see paragraph 24. It may well be that the tick box on the form is intended to cover a situation which is little more than a formality such as a document being in the post. For example, attached to the letter from the solicitors dated 21 August, 2012 is the letter from the University of Wales dated 28 May 2012 stating that the appellant's degree certificate would be sent to Birmingham Graduate School. The appellant was asked to check if the spelling of his name was correct in this letter as this is how it would appear on any documents issued by the University. There is a document dated the 30 May 2012 from the Validation Unit of the University of Wales certifying that the appellant was registered as a student and under additional information it states "the above named candidate is currently waiting to be admitted to their award and for their certificate to be issued." It may well be that what the tick box in paragraph G5 has in mind is circumstances such as this rather than a document issued by the Birmingham Graduate School two months previously. I prefer the submissions of Mr Ouseley on this issue and do not accept the material supplied with the application complies with the relevant requirements of the points

based system. Had the point been properly raised before me I would have rejected it.

20. In relation to Article 8 as I have said nothing has been done to furnish the Tribunal with any evidence in relation to the private of family life of the appellants or in relation to the best interests of the children.

21. The family will have developed links with the United Kingdom since 2006 and I will assume that Article 8 is engaged. Mr Ouseley referred me to E-A (Nigeria) [2011] UKUT 00315 (IAC) and paragraph 43 in particular:

> "It is important to recall that although the appellants may all have been here lawfully, they came to the UK for a temporary purpose with no expectation of being able to remain in the UK. The third appellant happened to be born in the UK whilst her parents were here for a temporary purpose. The expectation was that they would all return to Nigeria once the first appellant's studies were completed. Those who have their families with them during a period of study in the UK must do so in the light of that expectation of return."

22. I have been given no evidence about the education, health or other relevant material concerning the children or indeed the adult members of the family.

23. I have no basis for finding that it would not be in the best interests of the children to be with their parents and to return with them to Bangladesh to further their education there. I have not been provided with any information that their well being would be prejudiced by such a course. I am not persuaded on the limited material that the representatives have seen fit to put before me that the respondent's decision is not lawful and proportionate.

24. Mr Ahmed was anxious that the position of the appellants should not be prejudiced notwithstanding the deficiencies of the preparation for the hearing by the representatives. It is of course open to the solicitors to make representations to the Secretary of State bringing to the Secretary of State's attention all relevant matters concerning the welfare of the children and the family. The representatives were given the opportunity to bring such matters to the attention of the Tribunal and indeed were directed to do so. Nothing was done. Nevertheless I have no doubt that the Secretary of State will give careful consideration to any material submitted provided it is submitted promptly and will have in mind her duties under section 55.

The determination of the First-tier Judge was flawed by a material error of law. I remake it. I allow the appeal by the Secretary of State. I reverse the decision of the First-tier Judge.

The appeals of the appellants are dismissed under the immigration rules and Article 8.

Upper Tribunal Judge Warr
7 August 2013