



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/01741/2013

THE IMMIGRATION ACTS

Heard at : Field House
On : 12th August 2013

Determination Promulgated
On : 19th August 2013
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Before

Upper Tribunal Judge McKee

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

and

ATIF RIAZ

Appellant

Respondent

Representation:

For the Appellant: Miss Julie Isherwood of the Specialist Appeals Team
For the Respondent: No appearance

DETERMINATION AND REASONS

1. On 24th December 2012 the application made by Mr Riaz the previous January, for leave to remain as a Tier 1 (Post-Study Work) Migrant, was refused, and a decision was also taken to remove him by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006. Mr Riaz had been awarded a qualification by Anglia Ruskin University on 6th July 2012, but according to the UKBA

it should have been awarded by the time he applied for further leave in January. Therefore no points could be awarded for the qualification under Appendix A.

2. When an appeal to the First-tier Tribunal came before Judge Cary on 6th June 2013, however, *Khatel & ors* [2013] UKUT 44 (IAC) had shown that an application was to be understood as continuing until it was decided. The application in the instant case was not decided until December, after the qualification had been awarded. Therefore, concluded the judge, the requisite points should have been allocated to Mr Riaz, and his appeal was allowed under the Immigration Rules.
3. Shortly after Judge Cary's determination was promulgated on 18th June, judgment was handed down on 25th June in *Raju & ors* [2013] EWCA Civ 754, overturning *Khatel* and agreeing with the Home Office on the question of when an application is made. On 8th July Judge Chambers gave the Secretary of State permission to appeal to the Upper Tribunal, on the basis that *Raju* had now shown what the law was all along, which meant that Judge Chambers had arguably erred in following *Khatel*.
4. In reality, of course, it was unarguable. *Khatel* was wrong in law, and hence it was wrong for the First-tier Tribunal to allow the appeal in reliance on *Khatel*. When the matter was listed before me, Morgan Mark Solicitors, quite properly wishing to save their client unnecessary expense, informed the Upper Tribunal that they would not be attending the hearing, and asked that the appeal be determined 'on the papers'. The Secretary of State was entitled to an oral hearing, however, and was represented by a Senior Presenting Officer. I therefore proceeded to hear the appeal in the absence of a party, in accordance with rule 38 of the Upper Tribunal Procedure Rules 2008.
5. The First-tier determination must be set aside as erroneous in law, and it is obviously the best course for me to re-make the decision on the appeal myself. While the appeal against the refusal to vary Mr Riaz's leave falls to be dismissed, it should not be overlooked that there is also an appeal against another 'immigration decision', namely a decision to remove Mr Riaz. Judge Cary simply allowed "*this appeal*", without distinguishing between the two 'immigration decisions'. As *Ahmadi* [2013] EWCA Civ 512 has shown, he did not err in allowing the appeal against removal, and that part of his determination must therefore stand.

DECISION

In respect of the refusal of further leave to remain, the First-tier Tribunal made an error of law, and the Secretary of State's appeal to the Upper Tribunal is therefore allowed. The decision to remove the respondent is, however, not in accordance with the law, and to that extent the decision of the First-tier Tribunal, allowing the appeal, shall stand.

Richard McKee
Judge of the Upper Tribunal

12th August 2013