Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/04133/2013

THE IMMIGRATION ACTS

Heard at Birmingham	**Determination Promulgated**
On 6 August 2013	**On 20 August 2013**

Before

UPPER TRIBUNAL JUDGE KING TD

Between

NIKUNJ ASHOKBHAI RUPARELIYA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Ali of Malik & Malik Solicitors
For the Respondent: Mr Smart, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant was born on 13 April 1990 and is a national of India.

2. The appellant entered the United Kingdom on 24 January 2011 as a Tier 4 (General) Student. He had leave until 13 May 2012. He studied at the London School of Finance for an MBA. His course started on 6 January 2011 and was completed on 13 January 2012. He did not, however, receive his award of the MBA until 14 November 2012.

4. On 4 April 2012 he applied for leave to remain in the United Kingdom as a Tier 1 (Post-Study Work) Migrant. On 22 January 2013 that application was refused.

5. The appellant sought to appeal against that decision, which appeal came before First-tier Tribunal Judge Boyd on 18 April 2013. The appellant had been refused leave because he had not complied with all the requirements as set out under paragraph 245FD. It is a requirement under that paragraph that the appellant was awarded his eligible qualification no more than twelve months before the date of the application. At the time of the application the appellant had not received his award of the MBA from Wales but at the date of the decision on 22 January 2012 he had.

6. The First-tier Tribunal Judge considered and applied the case of **Khatel and Others (S.85A: effective continuing application) [2013] UKUT 00044 (IAC)**.

7. In essence that case held that the application was continuing until the date of decision. Therefore as the award had been made prior to the decision it was sufficient to satisfy the requirements of the Rules. Thus it was that it was deemed by the judge that the appellant had the requisite points and thus the appeal was allowed.

8. The respondent sought to appeal against that decision essentially on the basis that **Khatel** was wrongly decided. It was contended that if **Khatel** had been wrongly decided then Section 85A(4A) of the Nationality, Immigration and Asylum Act 2002 precluded the Tribunal from taking into account material that was not submitted both in support of and at the time of making the application to the SSHD.

9. Leave to appeal was refused on the basis that **Khatel and Others** reflected the law on the matter and that the judge had therefore applied the law correctly.

10. Subsequently however the case of **Khatel** was considered by the Court of Appeal in **Raju and Others [2013] EWCA Civ 754**. The Court of Appeal considered that **Khatel** had been wrongly decided on the point in question and that in relation to the Immigration Rules and the award of points, the date of the application was the operative date and that there was no concept continuing application. In other words **Khatel** was overturned.

11. Arising therefore from that decision permission to appeal was granted on the basis that the First-tier Tribunal, although acting entirely properly in applying **Khatel,** had in fact erred in law given the statement as to the law by the Court of Appeal in **Raju**.

12. Thus the matter comes before me in pursuance of that leave.

13. Both parties, namely Mr Ali who represents the appellant and Mr Smart who represents the respondent, were in agreement that the decision in **Raju** had established that the requirements of the Immigration Rules were to be considered at the time of application and not at decision.

14. Mr Ali, however, invited me to uphold the decision of Judge Boyd on the basis that it was good law at the time that he had applied it. Unfortunately it is to ignore the general jurisprudence as to error of law.

15. In those circumstances it is inevitable that the decision of Judge Boyd should be set aside and remade in the light of the statement of the law that now applies..

16. Mr Ali submits that the appellant was placed in a very difficult situation in regards to the timing of his application. The Rules relating Post-Study Work (Migrant) were to be changed within a short period of time. Therefore it was necessary for the appellant to make the application.

17. Mr Ali submits that the application was not dealt with fairly, having regard to the decision of **Rodriguez (Flexibility policy) [2013] UKUT 00041 (IAC)**. Further what had not been considered, either in **Khatel** or in **Raju** ,was the operation of the policy which was the subject matter of the decision. Given that the award was made before the decision, he submits that it was altogether unreasonable for the respondent to have acted as she did. Indeed he points to two important documents in the respondent's bundle, the first document at D2 was an information request from Rob Gregory, the caseworker dated 24 December 2012 relating to the question as to whether or not the award had been made and a reply from the college of 4 January 2013 to be found at Annex D1 confirming that the course had been completed. He submits therefore that it was fundamentally unfair of the respondent to have acted in the way that has been described having found out prior to the decision that the appellant had the award.

18. Mr Smart, on behalf of the respondent, invites me to find that the Immigration Rule means what it says. Whether it is unfortunate in a particular case is to some extent irrelevant. The requirements are set out in that Rule. The points-based system was designed to avoid discretion and arguments but to give certainty as to the position of individuals. He invites me to find that the decision of **Rodriguez** does not apply in the circumstances of this case but is concerned more with correcting errors of documentation rather than providing a flexibility as to the interpretation of the Rules.

19. It is to be noted that the flexibility policy which was the subject matter of **Rodriguez** arose in the aftermath of the application of Section 85A(2) of the Nationality, Immigration and Asylum Act 2002. It was designed to mitigate the otherwise unfortunate consequences of persons having the correct documentation but not

submitting it at the time of the application and thereby being prohibited from adducing it at a later stage by the Regulations. It was a policy designed to ensure that proper documentation had been provided and that originals rather than copies were to hand or that a missing document could be retrieved or that an incorrect document could be substituted for a correct one prior to decision being made.

20. The purpose of the policy was not to challenge the application of the Immigration Rules but rather to make sure that all those who sought to comply with those Rules had been given every opportunity to present the proper documentation as required under those Rules.

21. As the Court of Appeal said in paragraph 12 of that decision the policy

> "heralded unequivocally the introduction of a new policy whereby all appellants would be notified of the absence of mandatory evidence from their application and will be given the opportunity to rectify the relevant shortcomings prior to rejection."

22. In one sense the argument as to whether or not **Rodriguez** applied to the facts and circumstances for this case is largely academic because it is entirely clear, as I so find that the caseworker, Rob Gregory, applied for himself that policy. What was clearly missing from the application was the award. If the appellant had that award at the time of the application he would have succeeded under the Immigration Rules and if he did not he would not. Thus it is understandable that at D2 the caseworker on 24 December 2012 prior to making any decision writes to the college to confirm that the appellant had been awarded a degree from the University of Wales and the date of that award. He received a reply to his query as set out in D1 and at 4 January 2013. It gave the information that the award was made and that it was made on 14 November 2012. Thus it is clear that the caseworker has made the relevant inquiries as to the missing information.

23. What is done with that information is clearly set out in the decision itself. It reads as follows:

> "You made your application under Tier 1 (Post-Study Work) on 4 April 2012. I have contacted the University of Wales and they have confirmed your date of award as 14 November 2012. As the Immigration Rules state that the date of award must be within the twelve months directly prior to the date of application and your date of award is after this date, in line with Appendix A of the Immigration Rules, we have been unable to award points."

24. Thus it seems to me that the caseworker has done all that is reasonably required of him to do, namely to clarify the date of the award and having clarified it as having been after the date of application it falls to be refused.

25. I can detect no unfairness or impropriety in that procedure.

26. Mr Ali contends that there have been similar situations in which the respondent has granted the leave. He contends that inconsistency in decision making is unfair and unreasonable. Mr Smart submits that there is no evidence provided in concrete form that that particular contention is substantiated in fact. He repeats that the whole policy of points is to ensure consistency of decision making and to remove individual discretion from the equation.

27. It seems to be quite clear from the Immigration Rule itself that having the award prior to making the application is a mandatory requirement. The appellant was unable to satisfy that requirement and the late production of the award did not in any sense undermine the requirement that had been made. It is therefore understandable why it was that the Immigration Rule did not apply to the appellant.

28. Mr Ali also seeks to raise the issue of Article 8 contending that it was inadequately dealt with by the judge. In that connection I note that that specific challenge is not made in the written grounds of appeal.

29. The appellant came to the United Kingdom in January 2011 to study for his MBA. He gave some evidence about his situation and circumstances to me at the hearing. He said he wanted to use his qualification in business in India. His family were very much involved in the business enterprise in India. He wanted to stay on after he passed his MBA in order to obtain better exposure to the market place. In the year that has elapsed from his application he has been working in a warehouse as an operator. It would be his hope, however, were he to succeed in his appeal to join a multi-national company.

30. He said that all his family in India were involved in business. As to his private life, he rents accommodation. He has a girlfriend whom he met some four years ago. She works in Leicester and he sees her weekly. She too is on a post-study visa which expires in nine months' time. she is also from India. In addition to that relationship he has friends in the United Kingdom and attends parties and social functions.

31. Although Mr Ali initially made is submissions to us on the basis that the appellant had a legitimate expectation of remaining in the United Kingdom it is clear that certainly, when he embarked upon his studies he was intending to return to his family. It is clear that most of his roots are in India and I have little detail about the nature and seriousness of the relationship that he has with his girlfriend. She herself has limited leave to remain and no reason has been advanced as to why it would not be appropriate for her to return to India to be with him in the future.

32. I do not find that simply by being granted leave to study such creates a legitimate expectation to be able to remain. Were he to remain in the United Kingdom depends clearly upon his satisfying the requirements to do so and in this case the appellant did not meet the requirements at the time of his application.

33. I direct myself of course to the structured approach as set out in **Razgar** but do not find that the circumstances of the appellant are such as to entitle a decision that he should remain under Article 8 of the ECHR. I note that the Section 47 decision has been set aside. In those circumstances there remains a right of the appellant to challenge any removal decisions which may be made against him and he can of course at that stage raise matters in respect of Article 8 should he choose to do so.

34. Although it would seem therefore that the appellant cannot succeed in his appeal in relation to the Immigration Rules or in relation to human rights it is to be noted that the appellant was to all intents and purposes a bona fide student who obtained his qualification and seeks to further his experience in business before returning to India to be with his family firm. It is clear that he has the award that is required albeit not in time to satisfy the Rules. I hope that the Secretary of State might favourably consider any further application by the appellant which may be made.

Decision

36. The decision of First-tier Tribunal Judge Boyd shall be set aside. The appeal in respect of the Immigration Rules is dismissed. That in respect of Article 8 of the ECHR is dismissed.

Signed Date

Upper Tribunal Judge King TD