**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/21125/2012

**THE IMMIGRATION ACTS**

| **Heard at Manchester** | **Determination Promulgated** |
|---|---|
| **On 3rd March, 2014** | **On 25th March 2014** |
| **(Given extempore)** | |

**Before**

**Upper Tribunal Judge Chalkley**

**Between**

**RENY SAJI**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

***Representation:***

*For the Appellant:* *Mr I Hussain of Syed Law Office, solicitors*
*For the Respondent:* *Mr C Johnstone, Home Office Presenting Officer*

**DETERMINATION AND REASONS**

1. In this case the party who was the appellant before the First-tier Tribunal is a citizen of India born 6th May, 1976. It is convenient if I continue to refer to him throughout as "the appellant" in the remainder of this determination except where context requires otherwise and I refer to the respondent as the "Secretary of State for the Home Department"

2. The appellant entered the United Kingdom with valid leave to enter as a student. On 2nd April, 2012, the appellant applied for further leave to remain as a Tier 1 (Post-Study Work) Migrant

within the currency of his valid leave. On 22nd September, 2012, the Secretary of State refused that application. The refusal decision pointed out, inter alia, that in order to score points under the relevant provisions of the Immigration Rules the appellant was required to show they had been awarded a relevant eligible qualification within the 12 month period directly prior to the application, whereas the position was that the appellant had not been awarded his qualification, which was an MBA awarded by University of Wales, until after that date (on 2nd May, 2012).

3. The First-tier Tribunal allowed the appellant's appeal applying the guidance set out in *Khatel and others (s85A – effect of continuing application)* [2013] UKUT 00044 (IAC). Permission to appeal was then granted to the Upper Tribunal.

4. On 25th June, 2003 the Court of Appeal gave judgment in *Raju and others v Secretary of State for the Home Department* [2013] EWCA Civ 754. In October 2013 the Upper Tribunal reported its decision in *Nasim and others (Raju: reasons not to follow?)* [2013] UKUT 610 (IAC). In January the Upper Tribunal reported its follow-up case of *Nasim and others (Article 8)* [2014] UKUT 25 (IAC). It will be convenient if I refer to these below as "*Nasim 1*" and "*Nasim 2*" consecutively.

5. In light of these developments the Upper Tribunal sent Directions in this case. These gave notice that issues to be considered at the hearing included: (i) whether the determination of the Upper Tribunal made by reference to the determination in *Khatel* should be set aside in the light of the judgment of the Court of Appeal in *Raju and others* (reference was then made to *Nasim 1*) and (ii) if so, whether there was an error of law in the determination of the First-tier Tribunal such that the determination should be set aside. The Directions also required the appellant to serve on the Tribunal and the Secretary of State, not later than 7 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 seek to rely at that hearing (where necessary, complying with rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

6. The head note to *Nasim 1* states as follows:

> "*1. It is not legally possible for the First-tier Tribunal or the Upper Tribunal to decline to follow the judgment in Raju & Others v Secretary of State for the Home Department* [2013] EWCA Civ 754 *on the basis that the Secretary of State's Tier 1 (Post-Study Work) policy of July 2010 concerning the approach to be taken to 'late' submission of certain educational awards continued to apply in respect of decisions taken by the Secretary of State on or after 6th April, 2012 when the Immigration Rules were changed by abolishing the Tier 1 (Post-Study Work) route.*
>
> *2. The Secretary of State was under no duty to determine Post-Study Work applications made before that date by reference to that policy the rationale for which disappeared on 6 April. In particular:*
>
> *(a) a person making such an application had no vested or legitimate expectation to have his/her application so determined;*
>
> *(b) it was not legally unfair of the Secretary of State to proceed as she did;*
>
> *(c) the de minimis principle cannot be invoked to counter the failure of applications that were unaccompanied by requisite evidence regarding the granting of the award;*
>
> *(d) the Secretary of State's May 2012 Casework Instruction did not gloss or modify the Immigration Rules but merely told caseworkers how to apply those Rules;*
>
> *(e) evidential flexibility has no bearing on the matter;*

*(f) an application was not varied by the submission of evidence of the conferring of an award on or after 6 April, 2012; but even if it were, the application would fail on the basis that it would have been decided under the Rules in force at the date of variation; and*

*(g) an application under the Immigration Rules falls to be determined by reference to policies in force at the date of decision, not those in fore at the date of application."*

*(3) 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 6 April 2012 is the date on which the university or other institution responsible for conferring the award (not the institution where the appellant physically studied, if different) actually conferred that award whether in person or in absentia.*

*(4) As held in Khatel and Others (s85A; effect of continuing application)* [2013] UKUT 44 (IAC)*, section 85A of the Nationality, Immigration and Asylum Act 2002 precludes a tribunal, in a points-based appeal, from considering evidence as to compliance with the points-based Rules, where the evidence was not before the Secretary of State when she took her decision; but the section does not prevent a tribunal from considering evidence that was before the Secretary of State when she took the decision, whether or not that evidence reached her only after the date of application for the purposes of paragraph 34F of the Immigration Rules*."

**Submissions**

7. IMr Hussain for the appellant sought to argue that I should decline to follow *Nasim 1* and *2*. He suggested that the First Tier Tribunal Judge had not erred because he had applied the law as it was at the time of the decision. He suggested that that was wrong "to apply *Raju and others* retrospectively" as he put it. The decision in *Raju and others* post dated the Tribunal's decision and, he suggested, left the First Tier Tribunal's decision unaffected by it.

**My Assessment**

The Power to Set Aside

8. As noted earlier, prior to this case being listed for hearing, the Secretary of State had applied for permission to appeal to the Court of Appeal. However, the Tribunals, Courts and Enforcement Act 2007 and the Tribunal Procedure (Upper Tribunal) Rules 2008 made hereunder clearly contemplate that it is within the jurisdiction of the Upper Tribunal to set aside its decision in particular limited circumstances: see s.10(4)(c)) rules 45, 46. Logically a decision on whether to exercise such power must take place before any consideration of whether to grant permission to appeal to the Court of Appeal; and indeed Rule 45(1) stipulates that on receiving an application for permission to appeal the Upper Tribunal may review the decision in accordance with Rule 46. If the decision of the Upper Tribunal is set aside, then there is no longer any statutory basis for consideration of whether to grant permission to appeal. The decision sought to be appealed has been rendered null and void.

9. Rule 45(1)(a) provides that the Upper Tribunal may review a decision of the Upper Tribunal if "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". As noted earlier since the Upper Tribunal's decision in *Khatel* there has been the judgment in *Raju and others*, which constitutes binding Court of Appeal authority overturning *Khatel.*

10. Hence I am entirely satisfied that it is within my powers to proceed to consider whether to set aside the decision of the Upper Tribunal and I also consider that to do so furthers the overriding objective of the Rules to deal with cases justly and fairly under Rule 4. In this regard I note that

the procedure adopted by the Tribunal of notifying the parties in advance of the hearing that it would consider whether to exercise its powers to set aside afforded both parties ample opportunity to respond and address the point.

11. I have been asked to take a different view from that taken by the Upper Tribunal panel in *Nasim 1* and *2*. Whilst it is true in the abstract that I am not bound to follow a reported decision of this Chamber, I would only consider doing so if there were compelling reasons. Quite simply there are none here. In any event, for the most part *Nasim 1* gives effect to Court of Appeal authority, *Raju and others* in particular, by which I am bound.

The Immigration Rules

12. The appellant was not able to meet the requirements of the Immigration Rules under Appendix A because they required that he had been awarded his eligible qualification within the 12 month period prior to the date of application. At the date of application the appellant had not yet been awarded his eligible qualification. It had been awarded by the date of decision, but that does not assist. Whilst Section 85A of the Nationality, Immigration and Asylum Act 2002 does not prevent a Tribunal from considering evidence that was before the Secretary of State when she took the decision, even if post-application, the Rule in question in this context required such evidence to relate to an event that had happened prior to the date of application.

Fairness

13. Mr Hussain for the appellant has submitted that even though the appellant could not succeed under the Immigration Rules, there was patent unfairness such as to make the decision of the Secretary of State not in accordance with the law. That argument was fully explored in *Nasim 1* and was rejected for cogent reasons. There is no merit in his suggestion that *Raju and others* should not be applied. Judges do not make the law, Parliament does. Judges merely interpret the law and, occasionally do so incorrectly. The law has been clarified by the decision in *Raju and others*, but it has not been changed. The law as explained by the judgements in that decision always was the law.

Article 8

14. Upper Tribunal Judge Lane in the Directions mentioned earlier had directed that any further evidence or submissions relating to Article 8 should be sent at least 7 days before the hearing. Notwithstanding that Direction the appellant's representatives failed to submit any further evidence in accordance with Directions.

15. Mr Hussain told me that the appellant was not pursuing his Article 8 claim.

16. In any event satisfied that the appellant's Article 8 circumstances did not justify a conclusion that the decision of the Secretary of State amounted to a disproportionate interference with his Article 8 rights.

Section 47

17. In this case the Secretary of State had made a simultaneous s.47 decision. Although neither the First-tier Tribunal Judge nor the Upper Tribunal Judge dealt with the s.47 issue, it is settled law that such a decision was not in accordance with the law.

**Disposal**

18. It follows from what has been said above that the decision of the Upper Tribunal is contrary to binding Court of Appeal authority and cannot stand. I hereby set it aside. Applying the principles set out in *Raju and others* and subsequently in *Nasim 1* and *2*, I conclude that the decision I should re-make is to dismiss the appellant's appeal.

19. Accordingly:

    The decision of the Upper Tribunal is set aside.

    The decision I re-make is to **dismiss the appellant's appeal** except in relation to the Section 47 decision which I hold to be not in accordance with the law.

Upper Tribunal Judge Chalkley