Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/21844/2012
IA/21852/2012

THE IMMIGRATION ACTS

Heard at : Field House	**Determination Promulgated**
On : 24 February 2014	**On : 26 February 2014**
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Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

VADIVARASI RAJENDRAN
ARUN VEERASAMY

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Solomon, instructed by Jein Solicitors
For the Respondent: Mr G Jack, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. Mrs Rajendran and her husband Mr Veerasamy are citizens of India, born respectively on 10 June 1985 and 17 May 1979. Although this is the Secretary of State's appeal, it is convenient to refer to them as the appellants and, given that Mr Veerasamy's appeal is dependent upon that of Mrs Rajendran, I shall hereinafter simply refer to them as 'the appellant'.

2. The appellant's circumstances reflect those of the various appellants in the cases of Nasim and others (Raju: reasons not to follow?) [2013] UKUT 00610 ("Nasim 1") and Nasim and others (Article 8) Pakistan [2014] UKUT 25 ("Nasim 2"), in that she secured a decision in her favour in the Upper Tribunal in respect of her unsuccessful appeal against the decision of the Secretary of State to refuse her application for leave to remain in the United Kingdom as a Tier 1 (Post-Study Work) Migrant. The Upper Tribunal's favourable decision followed the approach of the Presidential Tribunal in Khatel and others (s85A; effect of continuing application) [2013] UKUT 00044. As in those cases, following the judgment of the Court of Appeal in Secretary of State for the Home Department v Raju & Ors [2013] EWCA Civ 754, directions were issued by the Upper Tribunal proposing to set aside the determination of the Upper Tribunal pursuant to rule 45(1)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008. Further to the appellant's objection to such course, the appeal came before me to consider that proposal.

3. The appellant's circumstances, as stated in the respondent's refusal decision, are that she entered the United Kingdom on 16 October 2010 with entry clearance conferring leave to enter as a Tier 4 (General) Student valid until 7 February 2012. On 4 April 2012 she applied for leave to remain as a Tier 1 (Post-Study Work) Migrant under the Points Based System and her husband applied as her dependant. The applications were refused on 26 September 2012 on the basis that the appellant was unable to meet the requirements of Appendix A of the Immigration Rules. She was awarded zero points for the date of her award as she had failed to show that she had been awarded her eligible qualification, a Master of Business Administration degree from the University of Wales, no more than twelve months before the date of her application. That in turn led to the award of zero points for English language under Appendix B. Her application was accordingly refused under paragraphs 245FD(c) and 245FD(d) of HC 395 and a decision was made to remove her by way of directions under section 47 of the Immigration Asylum and Nationality Act 2006.

4. The appellant's appeal against that decision was dismissed by the First-tier Tribunal in a determination promulgated on 21 November 2012. The First-tier Tribunal Judge found that she was unable to meet the requirements of the immigration rules since she had been awarded her degree in May 2012 and had thus not obtained the relevant qualification at the time she made her application on 4 April 2012 as the rules required. The judge dismissed the appeal under the immigration rules as well as on Article 8 grounds.

5. Following a grant of permission to appeal, the Upper Tribunal set aside the First-tier Tribunal's decision in the light of the decision in Khatel and others (s85A; effect of continuing application) [2013] UKUT 00044 and substituted a decision allowing the appeal under the immigration rules.

Appeal hearing and submissions

6. At the hearing I heard submissions from both parties.

7. Mr Solomon endorsed the appellants' submissions made in Nasim 1 in order preserve the appellant's position. However assuming that the Upper Tribunal's decision was to be set aside, he asked me to find errors of law in the First-tier Tribunal's determination on the grounds that the judge had not addressed the section 47 removal decision and had not made proper findings on Article 8. He submitted that the appellant's application had been refused on the basis of form and not substance as her course was expected to have been completed on 5 April 2012 but the degree was not awarded until May 2012. The appeal ought to be allowed.

8. Mr Jack submitted that the appeal had been correctly refused under the immigration rules and he relied on the decisions in Raju and Nasim. He submitted that the judge's decision did not contain any errors of law other than with respect to the removal decision. In the event that the section 47 decision could not now be withdrawn, he agreed that the appeal ought to be allowed on that limited basis only.

Consideration and findings

9. I start by making the observation, as raised in the Rule 24 notice, that the appellant's application appears to have been made after her leave had expired, in which case there was no valid appeal before the First-tier Tribunal and the appeal ought to have been formally dismissed on the grounds of lack of jurisdiction. However the point was not taken by Mr Jack and I note the uncertainty expressed in the third paragraph of the Rule 24 response which has not been resolved either way by the evidence. I therefore proceed on the basis of there having been a valid appeal.

10. The appellant's case is identical in all material respects to those of the appellants in Nasim 1 and 2 and the reasoning in Nasim 1 therefore applies to her. Following the Court of Appeal judgment in Raju, the Upper Tribunal's decision in Khatel is no longer a correct statement of the law and accordingly the decision of Upper Tribunal Judge Latter of 15 March 2013 has to be set aside pursuant to rule 45 (1)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

11. I therefore turn to the decision of First-tier Tribunal Judge Ghani and the appellant's grounds of appeal relating to that decision. Judge Ghani found that the appellant did not meet the requirements of the immigration rules and set out his reasons at paragraph 8 of his determination. There is no error of law in his decision in that regard. The evidence is that the appellant was awarded her degree by the University of Wales on 16 May 2012, that plainly being the relevant date as made clear in Nasim 1. Her application for leave to remain was made on 4 April 2012 and accordingly, following the principles in Raju and Nasim 1, she could not meet the requirements of the immigration rules.

12. With regard to Article 8, the judge's findings, at the end of paragraph 8, were undeniably brief. However, they were plainly open to him on the extremely limited evidence before him. I note that Article 8 was not raised in the grounds of appeal before the First-tier Tribunal and neither were such grounds mentioned in the appellant's statement. There was no evidence before the judge to indicate that the appellant had

established a private life capable of giving rise to a breach of Article 8 in the event of her removal from the United Kingdom. On the contrary the evidence was that she and her husband had left their child behind in India and had come to the United Kingdom for the sole purpose of her undertaking higher studies, which she had evidently completed by the time of the hearing. The judge's findings on Article 8 were also entirely consistent with observations made in Patel & Ors v Secretary of State for the Home Department [2013] UKSC 72 at paragraph 57 and in the head-note to Nasim 2.

13. It is the case, however, that Judge Ghani did not address the section 47 removal decision and in that respect he erred in law. Accordingly, I set aside his decision in that regard and re-make it by allowing the appeal on the limited basis that the removal decision was not in accordance with the law and that the matter be remitted to the Secretary of State to make a lawful removal decision.

DECISION

14. I set aside the determination of Upper Tribunal Judge Latter and substitute a decision on the following basis:

15. I uphold the First-tier Tribunal's decision to dismiss the appeals against the variation decision. However I set aside and re-make the decision of the First-tier Tribunal in relation to the section 47 removal decision, by substituting a decision allowing the appeals on the limited basis that the removal decision was not in accordance with the law.

Signed

Upper Tribunal Judge Kebede Dated: