Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/22271/2012
IA/22272/2012
IA/22273/2012

THE IMMIGRATION ACTS

Heard at Manchester
On 3rd March, 2014
(Given extempore)

Determination Promulgated
On 25th March 2013

Before

Upper Tribunal Judge Chalkley

Between

ERDENESUKH NERGUI
OYUNGEREL BAYARSAIKHAN
ERKHES ERDENESUKH

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Not present and not represented
For the Respondent: Ms Johnstone, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The first named appellant is a 31 year old citizen from Mongolia who was born on 12th June, 1981. The second appellant is his wife and she is also a citizen of Mongolia, having been born on 26th October, 1980. The third appellant is the child of the first and second appellants. He is also a citizen of Mongolia and was born on 30th September, 2003.

2. In this case the appellants, who were the appellants before the First-tier Tribunal, are referred to in this determination as "the appellants" and I continue to refer to the Secretary of State as "the respondent".

2. The first named appellant entered the United Kingdom with valid leave to enter as a student. On 4th April, 2012, he applied for further leave to remain as a Tier 1 (Post-Study Work) Migrant within the currency of his valid leave. On 26th 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 first named appellant was required to show that he had been awarded a relevant eligible qualification within the 12 month period directly prior to the application, whereas the position was that the first named appellant had not been awarded his qualification, which was a Master of Arts degree awarded by Anglia Ruskin University until after that date (a date in July, 2012).

3. The First-tier Tribunal dismissed the appellant's appeal. Permission to appeal was granted to the Upper Tribunal and on 31st January, 2013 Mr Clifford Mailer, sitting as a Deputy Upper Tribunal Judge decided on the basis of the *Khatel & Ors. (s85A; effect of continuing application)* [2013] UKUT 00044 (IAC) that the First-tier Tribunal had erred in law, that his decision should be set aside and that he should remake the decision allowing the appeal. In response to the determination of Mr Mailer, the Secretary of State applied for permission to appeal to the Court of Appeal.

4. On 25th June, 2013, the Court of Appeal gave judgment in *Raju & Others v Secretary of State for the Home Department* [2013] EWCA Civ 754. In October 2013, the Upper Tribunal reported its decision in *Nasim & Others (Raju: reasons not to follow)* [2013] UKUT 601 (IAC). In January the Upper Tribunal reported its follow-up case of *Nasim & Others (Article 8)* [2014] UKUT 24 (IAC). It will be convenient if I refer to these cases below as *Nasim* (1) and *Nasim* (2) consecutively.

5. In the light of these developments the Upper Tribunal sent directions in this case. These gave notice that issues to be considered at the hearing included (1) 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 & Others*. Reference was then made to *Nasim* (1) and (2) 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 seven days before the forthcoming hearing all written submissions and written evidence including written statements on the issue of Article 8 of the ECHR upon which they seek to rely at the 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. There was no appearance by or on behalf of the appellant. For the respondent, Ms Johnstone told me that she sought to rely on *Nasim 1* and *2*.

My Assessment

<u>The Power to Set Aside</u>

9. I deal first with the power to set aside. 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 Courts, Tribunals 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 Section 10(4C) and Rules 45 and 46. Logically, a decision as to whether to exercise such a power must take place before any consideration of whether or not to grant permission 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 considering whether or not to grant permission to appeal. The decision sought to be appealed has been rendered null and void.

10. Rule 45(1A) 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 adequately made before the Upper Tribunal's decision could have had a material effect on its decision*". As noted earlier, since the Upper Tribunal's decision in *Khatel* there has been the judgment of the Court of Appeal in *Raju & Others* which constitutes binding overturning *Khatel*. 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, namely 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 affording both parties ample opportunity to respond and address the point. 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 the Court of Appeal authority in *Raju & Others*, in particular by which of course I am bound. As to the Immigration Rules 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 twelve month period prior to the date of the 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. While Section 85A of the Immigration, Nationality and Asylum Act 2002 does not prevent a Tribunal from considering evidence that was before the Secretary of State when she took her 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 the application.

Article 8

11. The First-tier Tribunal considered the applicant's Article 8 appeal even though he had not raised a human rights appeal in his grounds of appeal. It concluded that the decision of the respondent did not constitute a disproportionate interference and dismissed the appeal.

12. Upper Tribunal Judge Lane, in the directions mentioned earlier, had directed that any further evidence or submissions relating to Article 8 should be sent to me seven days before the hearing. Notwithstanding that direction the appellant's representatives failed to submit any further evidence in accordance with the directions. Miss Hashmi submitted, however, that since the appellant had applied for further leave to remain on the basis that he had now been offered employment by the Pakistani High Commission, I should allow the appellant's Article 8 appeal. I am satisfied (bearing in mind the advice contained in paragraph 17 of *Razgar v Secretary of State for the Home Department* [2004] UKHL 27) that the appellant's Article 8 circumstances do not justify a conclusion that the decision of the Secretary of State amounts to a disproportionate interference with the appellant's Article 8 rights.

Section 47

13. In this case the Secretary of State has made a simultaneous Section 47 decision. Although neither the First-tier Tribunal Judge nor the Upper Tribunal Judge dealt with the Section 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 appellants' appeals.

19. Accordingly:

    The decision of the Upper Tribunal is set aside.

    The decision I re-make is to **dismiss the appellants' appeals** except in relation to the Section 47 decision which I hold to be not in accordance with the law. However, this may be academic because I have now been told that it appears that the appellants *may* have all departed the United Kingdom.

Upper Tribunal Judge Chalkley