Upper Tribunal

(Immigration and Asylum Chamber)

Nasim and others (Raju : reasons not to follow?) [2013] UKUT 00610(IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 8 October 2013	.....

Before

UPPER TRIBUNAL JUDGE ALLEN

UPPER TRIBUNAL JUDGE PETER LANE

Between

(1) MR MUHAMMAD NASIM

(2) MR TAHIR MAHMOOD

(3) MR MUHAMMAD TAIMOOR AHMAD

(4) MR AHSAN KHALID

(5) MR AHSAN NAEEM

(6) MR RIZWAN BASHIR

(7) MR MUHAMMAD ARIF MUGHAL

(8) MR MUHAMMAD ZULGARNAIN ARIF

(9) MISS NOOR UL HUDA ARIF MUGHAL

(10) MISS MAHAM ARIF

(11) MR SAFIA ARIF

(12) MR MUHAMMAD AFIF ARIF

(13) MR DANISHA EJAZ QURESHI

(14) MR JA'AFAR DORI GAMBO

(15) MR REHAN ANWAR

(16) MR ASIF RASHEED

(17) MR KAZI MOSHARROF HOSSAIN

(18) MR ANDROO HAJI RAFEEK

(19) MR QUMMER AZIZ

(20) MR ABHILASH MUKUNDHAKSHAN

(21) MISS SANDEEP KAUR

(22) MR SAJID ABDUL

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

Appellants (1), (3), (13), (15), (21), (22): Mr M Iqbal, Counsel, instructed by Law Wise Solicitor / Farani Javid Taylor Solicitors LLP

Appellant (2): Mr A Baddar, Solicitor, Farani Javid Taylor Solicitors LLP

Appellant (4): Mr A Mehta, Solicitor, Kingswood Solicitors

Appellant (5): Mr C Timson, Counsel, instructed by Primax Solicitors

Appellants (6) to (12): Ms J Heybroek, Solicitor, Morgan Mark Solicitors

Appellants (14) and (16): Mr Z Malik, Counsel, instructed by Coventry Law Centre / Malik Law Chambers Solicitors

Appellant (17): Mr M Jamali, Solicitor, Farani Javid Taylor Solicitors LLP

Appellant (18): Ms D Qureshi, Counsel, instructed by Legend Solicitors

Appellant (19): Mr A Jafar, Counsel, instructed by Lee Valley Solicitors

Appellant (20): Appeared in person (for part of the hearing)

For the Respondent: Mr M Gullick, Counsel, and Mr I Jarvis, Senior Home Office Presenting Officer

(1) It is not legally possible for the First-tier Tribunal or the Upper Tribunal to decline to follow the judgment in Raju and 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 6 April 2012, when the Immigration Rules were changed by abolishing the Tier 1 PSW 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 right or legitimate expectation to have his or 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 award;

(d) the Secretary of State's May 2012 Casework Instruction did not gloss or modify the Immigration Rules but merely told caseworkers 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 to have been decided under the Rules in force at the date of the 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 force 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 applicant 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 00044 (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 points-based Rules, where that 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.

DECISION

A. Introduction

1. With one exception, all of the immigrants listed above, whom for convenience we will call the appellants, secured decisions in their favour in the Upper Tribunal in respect of their appeals against decisions of the Secretary of State ("the respondent") to refuse to vary leave to remain in the United Kingdom, because that Tribunal followed the approach adopted by Blake J, President and Upper Tribunal Judge Coker in Khatel and Others (s85A; effect of continuing application) [2013] UKUT 00044 (IAC). In the case of Mr Nasim (appellant (1)) a Judge of the First-tier Tribunal allowed the appellant's appeal, applying Khatel .

2. The respondent applied for permission to appeal to the Court of Appeal against the determinations of the Upper Tribunal. At the time she did so, permission to appeal to the Court of Appeal had been granted by the Upper Tribunal in respect of Khatel . The respondent's grounds of application in the cases with which we are concerned in most cases reiterated the critique of Khatel contained in the grounds of application submitted in that case. The same is true of Mr Nasim, in whose case the respondent sought and obtained permission to appeal to the Upper Tribunal.

3. Around 200 applications for permission to appeal to the Court of Appeal were made by the respondent in respect of determinations of the Upper Tribunal, allowing appeals (or dismissing the respondent's appeals) on the basis of Khatel . It appears that a significant number of applications for permission to appeal to the Upper Tribunal were made by the respondent against decisions of the First-tier Tribunal, applying Khatel .

4. Since it was known that permission to appeal in Khatel had been granted (with arrangements made for the Court of Appeal to expedite the hearing in that court), it was considered appropriate to consider the respondent's permission applications once the judgments of the Court of Appeal became known. On 25 June 2013, the Court of Appeal allowed the respondent's appeal against the Upper Tribunal's determinations in Khatel and the cases of three other immigrants: Raju and Others v SSHD [2013] EWCA Civ 754.

5. As a result, the Tribunal gave directions in the cases before it where the respondent had applied for permission to appeal to the Court of Appeal. The Tribunal did so pursuant to rule 45(1)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008:-

“ **45.** —(1) On receiving an application for permission to appeal the Upper Tribunal may review the decision in accordance with rule 46 (review of a decision), but may only do so if—

…

(b) 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.”

6. The Upper Tribunal’s directions indicated that it proposed, in the light of Raju , to review the determinations of the Upper Tribunal, set them aside and re-make the decisions in the appeals by dismissing them. The directions made plain that the appellants would be (or continue to be) successful in their appeals against removal decisions made in respect of them, in purported pursuance of section 47 of the Immigration, Asylum and Nationality Act 2006. This was because those decisions were unlawful (Secretary of State for the Home Department v Ahmadi [2013] EWCA Civ 512).

7. In a large number of cases, including those with which we are concerned, the appellants objected. Various different reasons for doing so were advanced; but the common theme was that the appellants contended they should, in whatever manner, still be entitled to succeed in their appeals against the decisions to refuse to vary leave, notwithstanding the judgment in Raju .

8. The present cases have been selected on the basis that they provide a suitable vehicle for considering the arguments advanced regarding the effect of the judgments in Raju . Further directions were issued to the appellants and the respondent on 15 August 2013 and a case management hearing was held on 30 August. The Tribunal would like to commend the parties, their solicitors/representatives and Counsel for their efforts in ensuring that the Tribunal was able on 8 October 2013 to receive comprehensive submissions on the relevant issues.

B. Closing the Tier 1 (Post-Study Work) route

9. The cases before us concern the legal consequences of the respondent’s decision in 2011 to close the Tier 1 (Post-Study Work) route, which allowed graduates from abroad who had also studied in the United Kingdom two years in which to seek employment after their United Kingdom courses ended. The Government’s concern about this route had, in fact, been articulated by the Secretary of State for the Home Department in Parliament on 23 November 2010 when she said:-

“The old Tier One – supposedly the route for the best and brightest – has not attracted highly-skilled workers. At least 30% of Tier One migrants work in low-skilled occupations such as stacking shelves, driving taxis or working as security guards, and some don’t have a job at all. So we will close the Tier One general route.

Instead, I want to use Tier One to attract more investors, entrepreneurs and people of exceptional talent.”

10. A public announcement on 22 March 2011 confirmed the “closure of the Post-Study Work route, which allowed students two years to seek employment after their course ended. Only those graduates who have an offer of a skilled job from a sponsoring employer, in Tier 2 of the points-based system, will be able to stay to work”. The changes were described as being due “from April 2012”. Also on 22 March, the Secretary of State told Parliament:-

“We want the best international graduates to stay and contribute to the UK economy. However, the arrangements that we have been left with for students who graduate in the UK are far too generous.

They are able to stay for two years, whether or not they find a job and regardless of the skill level of that job. In 2010, when one in ten UK graduates were unemployed, 39,000 non-EU students with 8,000 dependents took advantage of that generosity.

We will therefore close the current Post-Study Work route from April next year."

C. The relevant rules as in force immediately before 6 April 2012

11. The relevant rule was paragraph 245FD:-

"To qualify for leave to remain as a Tier 1 (Post-Study Work) Migrant, an Applicant must meet the requirements listed below. Subject to paragraph 245FE(a)(i), if the Applicant meets these requirements, leave to remain will be granted. If the Applicant does not meet these requirements, the application will be refused.

Requirements:

(a) The Applicant must not fall for refusal under the general grounds of refusal, and must not be an illegal entrant.

(b) The Applicant must not previously have been granted entry clearance or leave to remain as a Tier 1 (Post-Study Work) Migrant.

(c) The Applicant must have a minimum of 75 points under paragraph 66-72 of Appendix A."

12. Paragraphs 66 to 72 of Appendix A were as follows:-

"ATTRIBUTES FOR TIER 1 (POST-STUDY WORK) MIGRANTS

66. An Applicant for entry clearance or leave to remain as a Tier 1 (Post-Study Work) Migrant must score 75 points for attributes.

67. Available points are shown in Table 10.

68. Notes to accompany the table appear below the table.

Table 10

Qualifications	Points
The Applicant has been awarded: (a) a UK recognised bachelor or postgraduate degree, or (b) a UK postgraduate certificate in education or Professional Graduate Diploma of Education, or (c) a Higher National Diploma ('HND') from a Scottish institution	20
(a) The Applicant studied for his award at a UK institution that is a UK recognised or listed body, or which holds a sponsor licence under Tier 4 of the Points Based System, or (b) If the Applicant is claiming points for having been awarded a Higher National diploma from a Scottish Institution, he studied for that diploma at a Scottish publicly funded	20

institution of further or higher education, or a Scottish bona fide private education institution which maintains satisfactory records of enrolment and attendance. The Scottish institution must: (i) be on the list of Education and Training Providers list on the Department of Business, Innovation and Skills website, or (ii) hold a Sponsor licence under Tier 4 of the Points Based System.	
The Applicant's period of UK study and/or research towards his eligible award were undertaken whilst he had entry clearance, leave to enter or leave to remain in the UK that was not subject to a restriction preventing him from undertaking a course of study and/or research.	20
The Applicant made the application for entry clearance or leave to remain as a Tier 1 (Post-Study Work) Migrant within 12 months of obtaining the relevant qualification or within 12 months of completing a United Kingdom Foundation Programme Office affiliated Foundation Programme as a postgraduate doctor or dentist.	15
The Applicant is applying for leave to remain and has, or was last granted, leave as a Participant in the International Graduates Scheme (or its predecessor, the Science and engineering Graduates Scheme) or as a Participant in the Fresh Talent: Working in Scotland Scheme.	75

QUALIFICATION: NOTES

69. Specified documents must be provided as evidence of the qualification and, where relevant, completion of the United Kingdom Foundation Programme Office affiliated Foundation Programme as a postgraduate doctor or dentist.

70. A qualification will have been deemed to have been 'obtained' on the date on which the Applicant was first notified in writing, by the awarding institution, that the qualification had been awarded."

D. The July 2010 policy

13. Crucial to the appellants' case is the policy, communicated to the respondent's caseworkers by an email of 15 July 2010, but not published more widely. The email began by stating that "we have recently received queries about how to handle Post-Study Work applications submitted before the date of award; apparently a number of such applications have been submitted". The email continued as follows:-

"The following advice addresses this issue:

1. The Applicants should not be submitting applications before they have confirmation of their award. If they are not going to obtain this until after their extant leave expires, they should be making their applications from overseas. Neither should caseworkers be putting cases on hold where the application has been submitted prior to the date of award.

2. If, by the time we come to make a decision on a Post Study Work application, we have received confirmation, on the appropriate specified document, that the qualification has been awarded, but the date of award post-dates the date the application was originally made, we should follow policy's

advice (attached below) and, on the basis of common-sense decision making, **should not refuse** simply because the date of award is after the date of application. (So, if the date of award is after the date of application **but** before the date of decision, this will be acceptable provided we have the specified documents to confirm).

3. If however, by the time we come to make a decision on the application we do not have confirmation of the award, included on an appropriate specified document, caseworkers should do the following:

• **Indication that the date of award is pending.** If the documentation provided makes it clear that the date of award (as defined in the Post Study Work policy guidance) will be some time in the future (i.e. The date of award will be after we are due to make the decision), then the application should be refused as normal. **We should not be putting such cases on hold** . The applicant cannot be considered in such cases to have an eligible award and no points can therefore be awarded for the Qualification. As specified in the published guidance, where an applicant under Tier 1 (Post-Study Work) is not awarded points for an eligible qualification, we are also unable to award points for any other point scoring area for Attributes;

• **No indication of the date of award or that it is pending.** If all other required documentation and information has been provided, but there is no indication, in the specified documentation provided, of what the date of award is, then caseworkers may adopt the usual approach, accommodated by the Evidential Flexibility arrangements, towards seeking this additional information. Once we have confirmation of the date of award, caseworkers should continue as normal, and follow the advice above, depending on whether the date we are due to make the decision is before or after the date of award."

14. In essence, it is the appellants' case that their applications, made before 6 April 2012 but not decided until after that date, should not only have been decided in accordance with the Rules applicable immediately before 6 April (which the transitional provisions for the new Rules required) but also fell to be decided in line with the July 2010 policy. The result of such an approach would have been (the appellants contend) that because in their cases the qualifications in question had been awarded before the date of decision, their applications should have been successful, notwithstanding that the date of award was after the date of application. The appellants advanced various arguments for why the July 2010 policy governed their cases, including "vested rights" and "legitimate expectation". We shall deal with these arguments in due course. Mr Iqbal categorised the July 2010 policy as the "pragmatic approach", as opposed to the "strict approach" of the post 5 April Casework Instruction, to which we will shortly make reference (see [16] below).

E. The respondent's Tier 1 (Post-Study Work) policy guidance (April 2012)

15. In his submissions, Mr Jafar laid emphasis upon the following paragraphs of the respondent's Tier 1 (Post-Study Work) published policy guidance, as in force immediately before 6 April 2012:-

" **Qualification**

53. An applicant can claim 20 points if he/she has been awarded one of the following qualifications:

• A United Kingdom recognised degree at Bachelor, Master or PhD level; or

…

Documents required

61. Paragraph 245 AA (and 54 of Appendix A) of the Immigration Rules state that we will only award points when an applicant provides the specified evidence that he/she meets the requirements for this category.

62. In order to score 20 points for this attribute, the specified evidence the applicant must provide is:

i) the original certificate of award. This must be the applicant's original certificate (not a copy) and must clearly show the:

• applicant's name;

• title of the qualification; and

• name of awarding body

We will not accept provisional certificates.

If the certificate has yet to be issued, the applicant will be unable to provide the original certificate of award. In these circumstances, the applicant must provide:

ii) an original letter from the institution at which the applicant studied towards his/her eligible qualification. The letter must be an original letter (not a copy), on the official letter-headed paper of the United Kingdom institution at which the applicant studied. It must have been issued by an authorised official and must confirm the:

• applicant's name;

• title of the qualification;

• Date of the award (as defined in paragraph 79 of these guidance notes);

• the body awarding the qualification;

• explain the reason why the applicant is unable to provide their original certificate of award; and

• confirm that the certificate will be issued.

…

Date of eligible qualification/Completion date of United Kingdom Foundation Programme.

78. An applicant can claim 15 points if the eligible qualification was obtained within the 12 months immediately before his/her application for entry clearance or leave to remain under Tier 1 (Post-Study Work) or if his/her application for entry clearance or leave to remain is being made within 12 months of completing a United Kingdom Foundation Programme Office affiliated Foundation Programme as a postgraduate doctor or dentist.

79. The date of award is taken as the date on which the applicant was first notified, in writing, by the awarding institution, that the qualification has been awarded. This notification may have been made in writing, directly to the applicant, or by the institution publishing details of the award, either in writing (for example, via an institution notice board) or electronically (for example, on the institution's website). Where the notification was not in the form of direct correspondence to the applicant, we will require direct confirmation of the date of award from the institution in writing.

80. We do not accept the date of award as the date of graduation.

81. Providing the date of award of the eligible qualification is no more than 12 months before the date of application, 15 points will be awarded for this attribute.

82. Applicants may submit an application for leave to remain before the completion of his/her Foundation Programme provided that he/she **will** complete the Foundation Programme, no more than 30 days after submitting this application

Documents required

83. In order to score 15 points for this attribute, the specified evidence the applicant must provide is:

a) original document from the institution at which the applicant studied towards his/ her eligible qualification or Foundation Programme as a postgraduate doctor of dentist (where the applicant is applying within 12 months of this period).

The letter must be an original letter (not a copy), on the official letter- headed paper of the United Kingdom institution at which the applicant studied. It must have been issued by an authorised official and must confirm the:

• applicant's name;

• title of the qualification;

• start and end dates of the applicant's period/s of study and/or research for this qualification at the United Kingdom institution; and date of award (as defined in paragraph 79 of these guidance notes).

84. If the applicant has already provided an original letter in support of points claimed for the other attributes, then the same letter is acceptable as evidence in support of this attribute, providing it contains all the required information."

F. The respondent's Casework Instruction ("CI") of 23 May 2012:- Tier 1 (Post-Study Work) closure: applicants applying before 6 April 2012 prior [to] their qualification being awarded

16. On 23 May 2012 the respondent produced a casework instruction which, unlike the July 2010 email, was published. The relevant provisions for our purposes are as follows:-

"1. This instruction outlines how caseworkers should handle applications where the applicant has submitted a Tier 1 (Post-study Work) application prior to 6 April 2012 without final confirmation that they have been awarded an eligible qualification. More specific refusal wording is provided along with a document for caseworker to add to bundles on any full right of appeal case.

Background

2. Tier 1 (Post-Study Work) closed to new applicants on 6 April 2012. An announcement detailing the intention to close the scheme was published in March 2011 and the exact date of closure was formally announced in the Statement of Change published on 15 March 2012.

3. No formal transitional arrangements have been included in the Immigration Rules, as Tier 4 students have alternative methods of taking up employment within the UK, i.e. under Tier 2, Tier 5 (Government Authorised Exchange) for those undertaking professional qualifications, or the new Tier 1 (Graduate Entrepreneur) scheme for those who have developed a world class business idea.

4. You were previously advised that if applicants were awarded their eligible qualification after submitting their application, but before you had made a decision on the case, you were able to accept the evidence allowing the case to be approved. This was a pragmatic interpretation of the Immigration Rules, as any migrant refused on this basis was able to reapply immediately using identical evidence and the case could be approved.

5. However, as the route is now closed and the Immigration rules are now being applied strictly (sic).

Case Consideration

6. Applicants may still apply for Tier 1 (Post-Study Work) before completing or being given final notification of their eligible award. The date of award is defined as the date the migrant was first given notification in writing that they had passed their qualification.

7. You should consider any application where the date of award is on or after 6 April 2012 strictly in line with the published Immigration Rules. In practice this means you should refuse applications as the migrant has not been awarded their qualification within the 12 months directly prior to date of application.

8. The relevant refusal paragraph appeared in Table 10 of Appendix A but is now archived in Appendix F of the Immigration Rules.

9. The following scenarios explain the action you should take on Tier 1 (Post-Study Work) applications:

No evidence of qualification provided

10. Where an applicant has not provided evidence to show that they have been awarded a qualification, you should only request evidence of this award under the Evidential Flexibility policy in the following circumstances:

a. the applicant has given an indication in their application that they should have received confirmation of their award on or before 5 April 2012;

b. the applicant has not given any indication of when they are likely to obtain their qualification.

11. If you are requesting information under Evidential Flexibility, you would also be able to request other missing information at that time (e.g. maintenance).

12. When requesting further information, you should make it clear to the applicant that the qualification must have been awarded prior to the closure of the scheme otherwise it cannot be accepted.

13. You should not request further evidence of a qualification if the migrant has indicated that it would be awarded on or after 6 April 2012, even if that date has passed when you are assess the case (sic).

Evidence of qualification provided after application submitted

14. Where an applicant has submitted an application without evidence of an eligible award, but subsequently sent this evidence into the UK Border Agency, you must check the date of award to determine whether it can be accepted.

15. Where the date of award is on or before 5 April 2012, you can use this evidence to award points for ‘date of award’ (assuming other Tier 1 (Post-Study Work) requirements are met).

16. Where the date of award is on or after 6 April 2012, points will not be awarded for date of award, as we will apply the Immigration Rules as written; therefore the applicant did not obtain their qualification in the 12 months directly prior to date of application."

17. As we have said, Mr Iqbal characterised the 2012 CI as the "strict approach". The appellants contend that this approach, adopted by the respondent in their cases, was unlawful. Again, we will deal with the detailed arguments in due course.

G. Khatel and others (s85A; effect of continuing the application) [2013] UKUT 00044 (IAC)

18. In Khatel the Upper Tribunal, considering the position of appellants, whose applications for Tier 1 Post-Study Work leave had been made shortly before 6 April 2012, but whose notifications of award had been made only after that date, relied upon the judgments in AQ (Pakistan) v SSHD [2011] EWCA Civ 833 for the proposition (based on a concession by Counsel for the Secretary of State in AQ) that an application "is treated as continuing until the date of decision" [22]. Before the Upper Tribunal, the respondent's stance was that that position had changed on the coming into force of section 85A of the Nationality, Immigration and Asylum Act 2002, the relevant provisions of which are as follows:-

"…

(3) Exception 2 applies to an appeal under section 82(1) if –

(a) the appeal is against an immigration decision of a kind specified in section 82(2)(a) or (d),

(b) the immigration decision concerned an application of a kind identified in Immigration Rules as requiring to be considered under a "Points Based System", and

(c) the appeal relies wholly or partly on grounds specified in section 84(1)(a), (e) or (f).

(4) Where Exception 2 applies the Tribunal may consider evidence adduced by the appellant only if it –

(a) was submitted in support of, and at the time of making, the application to which the immigration decision related …"

19. On the basis of AQ (Pakistan) , the Upper Tribunal held that, since the application must be treated as continuing until the date of decision, the appellants before them were entitled to succeed, since notification of their awards, as required by the respondent, had been submitted to her before she decided their applications.

H. Secretary of State for the Home Department v Raju and Others [2013] EWCA Civ 754

20. Before the Court of Appeal, the Secretary of State (represented by Mr Gullick, who appears for her in the present cases) adopted a markedly different stance. Instead of relying on section 85A, which she conceded did not preclude consideration by the Tribunal of evidence adduced after the date of application (but before the date of decision), the Secretary of State rested her case on the submission that the Immigration Rules required the applicant to have made the application for leave to remain "within twelve months of obtaining the relevant qualification" (Appendix A, Table 10, fourth section); and that paragraph 34G of the Rules provided:-

"For the purposes of these rules, the date on which an application or claim (or a variation in accordance with paragraph 34E) is made is as follows:

(i) when the application form is sent by post, the date of posting,

(ii) when the application form is submitted in person, the date on which it is accepted by a public enquiry office of the United Kingdom Border Agency of the Home Office,

(iii) where the application form is sent by courier, the date on which it is delivered to the United Kingdom Border Agency of the Home Officer, or

(iv) where the application is made via the online application process, on the date on which the online application is submitted."

21. Thus, the fourth section of Table 10 (see [12] above), read with paragraph 34G, created a substantive requirement, with which the appellants in Khatel could not comply. Accordingly, the fact that they had adduced evidence, prior to the date of decision, that they had by then been notified of their awards, was of no avail.

I. The appellants' submissions on why rule 45 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (if available) should not be applied; or why, if it is applied, the appellants should succeed on the re-making of the decisions in their appeals against refusal to vary leave to remain

(a) General

22. As we have already seen, it is a central theme of the appellants' submissions that the respondent had a legal duty to determine their applications for variation of leave to remain, by applying the "pragmatic" approach of the July 2010 policy, as set out in the email to caseworkers. We believe it is helpful to state at this stage the basic reason why we consider those submissions to be misconceived. As the Parliamentary history set out above makes plain, by March 2011 the respondent had publicly declared her conclusion, that the Tier 1 (Post-Study Work) route had, in policy terms, been a failure. It had not, in the government's view, led to the best international graduates staying and contributing to the United Kingdom economy. The Tier 1 (Post-Study Work) arrangements were, according to the Secretary of State, far too generous: "[Students] are able to stay for two years, whether or not they find a job and regardless of the skill level of that job. In 2010, when 1 in 10 UK graduates were unemployed, 39,000 non-EU students with 8,000 dependents took advantage of that generosity" (Hansard, 22 March 2012, column 857).

23. The appellants have not begun to show why the Secretary of State was not entitled, as a matter of government policy, to so conclude and, as a result, to close the Tier 1 (Post-Study Work) route with effect from April 2012. As Mr Gullick states: "No students who were already in their final year at the time of the announcement would have been affected, and those who had not yet started or were in an earlier stage of their courses would have time in which to make alternative plans."

24. So long as the Tier 1 (Post-Study Work) route continued, the July 2010 policy was justified by the fact that, as explained in the May 2012 CI, "any migrant refused on this basis [i.e., that he or she was awarded the relevant qualification after submitting the application] was able to reapply immediately using identical evidence and the case could be approved". But that rationale disappeared on 6 April 2012, with the closure of the Tier 1 (Post-Study Work) route. There was, accordingly, an entirely legitimate policy reason for the respondent's decision, as expressed in the 2012 CI, to enforce the pre-6 April relevant Immigration Rules.

25. We therefore accept Mr Gullick's submission that what the respondent was doing in the May 2012 CI was to avoid speculative applications for leave to remain by students who did not have the relevant awards and so ensure the closure of the route in an orderly manner.

(b) Vested rights

26. The appellants' argument under this heading is founded on remarks by Lord Neuberger at [52] and [53] of Odelola v Secretary of State for the Home Department [2009] UKHL 25, giving the example of a hypothetical applicant in circumstances where, at the time they made their application, the Rules said that "where an application was not heard within a period of six months of its being made, it could only be refused on grounds of national security; and the rules were then amended so that the period was extended to one year" [52]. Lord Neuberger considered that in such a case, where an application was made more than six months before the period was extended by amendment, the applicant would have a vested right at the time of the amendment.

27. For the present appellants, it is argued that the changes in the Immigration Rules "laid before Parliament on the 15th March 2012 created for these appellants a presumption that the change - not in the Immigration Rules but in Casework Instructions - was not meant to apply" to them. The respondent argues that this submission demonstrates a failure to understand the terms of the Casework Instructions, and makes the point that the Immigration Rules as they were at 5 April 2012 were applied in these cases, and the appellants were unable to meet the terms of those Rules. Mr Gullick also made the point that Lord Neuberger's opinion in Odelola was agreed with by only one of his colleagues (Lord Hope) and therefore did not form part of the ratio of the judgment in any event.

28. We agree with the respondent on this issue. It is difficult to extract a meaningful proposition from the submission, just quoted. Nothing in the rule changes that came into force on 5 April 2012 says anything about the July 2010 policy, which might rationally be construed as preserving that policy. On the contrary, as we have already noted, the April 2012 rule changes destroyed the rationale for that policy, since there would no longer be any point in waiting for confirmation of an award: once in possession of the award, an applicant could no longer make an application that could succeed under the Immigration Rules.

29. As was said by Lord Brown (with whom Lord Hope and Lord Scott agreed) in Odelola , at [38]:

"The … analogy is with planning law and practice which requires that all applications are determined in accordance with whatever policies are in force at the time the decisions are taken."

30. The instant appeals are, in any event, not cases where, in the words of Lord Neuberger at [54] of Odelola : "… a right given under the rules had actually come into existence by the time of the amendment". As we have seen, the change in the Immigration Rules was heralded well in advance and the appellants were unable to satisfy the requirements of the Rules by the date on which they changed.

(c) Legitimate expectation/proportionality

31. Mr Iqbal sought to rely on the judgment of Sir George Newman in HSMP Forum Limited v SSHD [2008] EWHC 664 (Admin) for the submission that the appellants had a legitimate expectation that their applications would be determined in accordance with the July 2010 policy. At [49], the Judge found that the:-

"… conflict to which this case gives rise requires the Court to establish a balance between the importance of preserving the defendant's right to exercise her discretionary powers in the field of immigration control and the desirability of requiring her to adhere to the statements or practice announced in connection with the original HSMP."

32. As the Tribunal held in Ferrer (limited appeal ground; Alvi) [2012] UKUT 304 (IAC), in finding against the Secretary of State on that issue, Sir George Newman:-

"regarded it as particularly important that the Secretary of State had publicly stated that the requirements or conditions to be met by an HSMP in order to achieve settlement in the United Kingdom, would not be changed to that person's disadvantage, once he or she had arrived here pursuant to the scheme."

Thus, although

"it would not have been inconsistent with nor inimical to the scheme for it to be expressly stated that admission to it gave no guarantee that the criteria at the extension stages would not change during the migrant's participation in the scheme",

Sir George Newman held that the Secretary of State could not "escape from the consequences of having failed to make that clear" [47].

33. In the present cases, the appellants have been unable to identify any statement of the respondent (or her predecessor) which comes anywhere near the statements made in connection with participants in the HSMP scheme. In particular, we have not been shown any statement to the effect that those coming to the United Kingdom as graduate students would have an entitlement to work here after the completion of their United Kingdom studies. Participants in the HSMP scheme were specifically encouraged to sever links with their home countries, on the basis that their future lay in the United Kingdom. The position of a person coming to study in the United Kingdom can immediately be seen to be quite different. We say this, having regard to paragraph 245V of the Rules, revoked on 5 April 2012, which described the purpose of the Tier 1 (Post Study Work) route as being "to encourage international graduates who have studied in the U.K to stay on and do skilled work". There is no explicit or implicit promise in the phrase "stay on" that those concerned were on an officially recognised avenue towards settlement in the United Kingdom. Contrast the Government's published 2003 Guidance to highly skilled potential migrants:

"It is important to note that once you have entered under the Programme you are in a category that has an avenue to settlement" (HSMP Forum Ltd at [13]).

The other matter to notice is, of course, that many Tier 1 (Post Study Work) migrants were not, in fact, staying on to do highly skilled or even skilled work.

34. At this point, it is necessary to address a further submission of Mr Iqbal, concerning the Tier 1 (Post-Study Work) application form, which the appellants completed. At G5 of the form, we find the words "Tick the box to show that the applicant has sent his/her original certificate of award to prove his/her qualification (the applicant can only claim for one qualification)". There are then two boxes. One is set against the words "Original certificate of award". The other box is set against the following words:-

“If the applicant has been unable to submit their original certificate of award because it has not yet been issued, tick the box to show that the applicant has sent an original letter from the institution giving details of the awarding body, and confirmation that the certificate of award will be issued.”

35. Mr Iqbal submitted that this indicates applicants were led to believe they would be dealt with in line with the July 2010 policy. We reject that submission. Part G of the application form relates to the 20 points available for having a relevant qualification. The appellants were, in fact, awarded those 20 points. It is the 15 points in the “fourth section” of the box in Table 10 which they did not obtain, and which led to the refusal of their applications. Part K of the application form deals with this aspect. The boxes in this Part lie beneath the following rubric:-

“K1. The applicant must have made the application for entry clearance or leave to remain as a Tier 1 (Post-Study Work) Migrant within twelve months of obtaining the relevant qualification or within twelve months of completing a United Kingdom Foundation Programme.”

The appellants cannot, therefore, rely on the box in Part G of the application form, in order to advance their arguments based on legitimate expectation.

36. Before us, there was some discussion about the status of the July 2010 policy, being contained, as we have indicated, in an email which was not made public. Mr Iqbal referred to the judgments of the Supreme Court in Lumba (WL) v Secretary of State for the Home Department [2011] UKSC 12 in support of the submission that the respondent was not entitled to operate a “secret” policy, which ran counter to her published policies. We have difficulty with this submission. It amounts to an attack on the very policy upon which the appellants seek to rely. Whether or not the actual email was made public, we accept that, over time, immigration practitioners would have become aware of its effects; namely, that during the currency of the Tier 1 (Post-Study Work) route, applicants were not being refused variations of leave to remain, provided that they had submitted confirmation of awards before the respondent made her decisions on their applications. The issue is, therefore, whether the appellants, and others in their position, can demonstrate an entitlement to have their applications decided by reference to the July 2010 policy.

37. Allied to legitimate expectation is the submission that the respondent’s treatment of the appellants is disproportionate. We find that it is not. To require the respondent to apply the July 2010 policy to all Tier 1 (Post-Study Work) applications made before 6 April 2012 would be to legitimise entirely speculative applications (see [25] above). Whilst it would be possible to construct hypothetical alternative policies, which might have benefited the appellants and others in a similar position, without casting the net more widely, as a matter of public law the respondent was entitled to decide that the July 2010 policy should end on 5 April 2012. To find otherwise would, we consider, be for this Tribunal to trespass upon the respondent’s statutory functions.

(d) Fairness

38. The issue of fairness is closely allied to that of legitimate expectation and proportionality. The argument was advanced before the Court of Appeal in Raju, that there was no rationale for, on the one hand, awarding someone 20 points in respect of their qualification, whilst refusing to award that person 15 points because the date of the award was after 5 April 2012. This argument did not find favour with Moses LJ:-

“[12] Whilst I acknowledge that to allow applications which anticipate the award of the necessary qualification does not undermine the purpose of the policy, the wording of the fourth section [of Table

10 in Appendix A] seems to me plain. The fact that an Applicant will achieve a score of 60 points, by obtaining a recognised degree at a qualifying institution during a lawful stay, achieves nothing. Only a score of 75 points attracts the right to be granted leave to remain. There is no room in the points-based scheme for a near miss. Viewed as a whole, qualification under Table 10 requires strict compliance with the requirement to make the application within the period of one to twelve months from the time when the qualification was obtained.

[13] Read in that way, the Rules are analogous to those which require an applicant to satisfy a requirement at the date of his application, such as to require him to have a specified minimum level of personal savings at least three months prior to the date of the application (para 245AA) and to the Rules as to level of funds under the applicant's control on the date of the application under App C – maintenance (para 1A(g)). …"

39. An alternative "fairness" submission was advanced, to the effect that it was not in the appellants' control to provide appropriate notification of the relevant awards at any particular time: they were effectively at the mercy of the awarding institution. A corresponding argument was advanced before Holman J in R (on the application of Syed) v Secretary of State for the Home Department [2013] EWHC 984 (Admin). The argument there was that it was unfair for the Secretary of State not to treat a professional level qualification of the Association of Chartered Certified Accountants as a qualification entitling an applicant to leave to remain. At [29] Holman J said:-

"Finally, and with the utmost eloquence, Mr Al Mustakim made submissions as to the 'fairness' and 'proportionality' of the Rules in their relevant form. He submitted that it is unfair to migrants who obtained the ACCA Qualification and/or not proportionate, that they cannot obtain points. That cannot, however, be used to support an alternative construction of rules or rules and/or Policy Guidance, which are clear. It is not permissible to read into Rules and/or Policy Guidance words which are not there, simply on a submission that it would have been more fair if they had been."

The same is true of the present cases.

40. The appellants sought to rely upon what the Tribunal said at [55] of Ferrer , where it held that:-

"If, on proper analysis, the respondent's contention is supported by the plain and ordinary meaning of the Rules, then considerations of fairness cannot produce a different interpretative result. However, where the provisions in question are ambiguous or obscure, which is regrettably often the case where the Rules comprise or have an interaction with points-based rules, then it is legitimate to interpret the provisions by assuming that Parliament is unlikely to have sanctioned Rules which (a) treat a limited class of persons unfairly; and (b) disclose no policy reason for that unfairness."

41. However, as Moses LJ held in Raju , there is no ambiguity or lack of clarity regarding the "temporal" requirement in the fourth section of Table 10. In any event, there is, as we have held, an entirely valid policy reason for the respondent's decision to treat the appellants in the way she has.

(e) De minimis

42. On behalf of the appellants it is argued that the fact that the date of award was not before the date of application should essentially be disregarded, on the basis of the maxim de minimis non curat lex . [1] It is argued that on the basis of a purposive construction of the Immigration Rules in these cases the purpose of the Tier 1 (Post-Study Work) category can be met, the appellants are graduates who have studied in the United Kingdom and who are willing to stay to gain work experience and there is no "magic" in the date of award. The appellants, accordingly, contend that, given the trifling

nature of the requirement of the date of award, the decision not to award 15 points falls within the de minimis principle. As a consequence, they submit that, in the light of Miah v Secretary of State for the Home Department [2012] EWCA Civ 261, the decision is not otherwise in accordance with the law.

43. On behalf of the respondent, Mr Gullick says that there is no room for the application of the de minimis principle; the wording of the relevant rule is clear; the appellants' submissions are, in truth, a "near miss" argument wrapped up in the term de minimis ; the points-based system Immigration Rules were recognised by the Court of Appeal in Alam v Secretary of State for the Home Department [2012] EWCA Civ 960 at [45] as necessarily involving a lack of flexibility as the price of securing consistency, which may well result in "hard" decisions in individual cases; and the Secretary of State's answers to Parliament recorded in Hansard in 2011 demonstrate why the then current post-study work route was to be closed from April 2012. In particular, the point is made that the arrangements that currently existed were far too generous. As a consequence, the respondent says it is clearly inaccurate for the appellants to claim there was no policy rationale for ending that route. The appellants chose to make applications to remain under a route that was closing.

44. Miah was concerned with an appellant whose appeal had been dismissed in circumstances where he sought further leave to remain in the country as a Tier 2 (General) Migrant. The essential issue in that case was consideration of the so-called "near-miss" argument, as it is referred to at [2] of the judgments. The argument was in essence that where an appellant missed satisfying the requirements of the Immigration Rules by a small margin and contended that his removal from the United Kingdom would breach his rights under Article 8, the weight to be given to the maintenance of immigration control should be diminished for the purpose of the assessing whether his removal from the United Kingdom is permitted under Article 8(2). The Court's conclusion, as set out in the judgment of Stanley Burnton LJ, with whom Lewison and Maurice Kay LJJ agreed, was that there was no "near-miss" principle applicable to the Immigration Rules. At [12] Stanley Burnton LJ pointed out that the "near-miss" principle contended for was not the same as the de minimis principle. He went on to say that if a departure from a rule was truly de minimis , the rule was considered to have been complied with. By contrast, the starting point with a near-miss argument was that the relevant rule had not been complied with; and in the instant case the failure to satisfy the requirement of five years' lawful residence as a work permit holder, by a period of some two months, was not de minimis .

45. The same point was also touched on in MD (Jamaica) and another v Secretary of State for the Home Department [2010] EWCA Civ 213, a case concerning the interpretation and application of the long residence provisions contained in paragraph 276 of the Immigration Rules (as then in force). In that case both appellants had been continuously resident in the United Kingdom for a period in excess of ten years but their applications were refused by the Secretary of State on the basis that they had not been lawfully resident in the United Kingdom throughout the period and that there had been a period or periods during which they had been overstayers after their leave to remain had expired and before they had sought and been granted further leave to remain. The Court of Appeal endorsed giving paragraph 276 its plain and ordinary meaning. In argument it had been suggested that the interpretation adopted by the judges below led to absurd and unfair results in that an applicant who was a day late in submitting his application would become an overstayer and lose the benefit of the continuous lawful residence rule, even if he had been in continuous residence in the United Kingdom for a period well in excess of ten years and had been a model resident. The Court of Appeal said that such a case was catered for by an application of the de minimis principle. In the cases before the Court the intervals between the expiry of the existing leave to remain and the date on which the first

appellant applied for further leave to remain were two and seven weeks respectively (there had been two interruptions), and in the case of the second appellant the period without leave was 38 days.

46. We agree with the respondent that the de minimis principle is not applicable in the circumstances of these appeals. Indeed, Mr Gullick's submissions now find confirmation in what Lord Carnwath has subsequently held at [45] to [57] of Patel and others v Secretary of State for the Home Department [2013] UKSC 72. As made clear in Miah , and reinforced at [12] of Raju , there is no room in the cases with which we are concerned for a "near- miss". The wording of the relevant rule is clear and it is a far stretch from the situation referred to in MD, where an application was one day late in the context of an application on the basis of ten years' residence in the United Kingdom. Effectively, it is an attempt to argue near-miss in the context of a de minimis argument. It was made clear in March 2011 that the route in question would close in April 2012, which further supports the argument that there was sufficient opportunity to make the relevant applications within this timescale. But in the end that is a point of relatively little relevance to the de minimis argument. The present cases involve failures to meet a requirement of a rule in respect of which we do not see any room for a purposive argument, given the clear terms of the rule and the context in which it operated. The argument adds little if anything to the fairness issue which we consider elsewhere in this determination.

(f) Retrospectivity and the Alvi principle (Queen (on the application of Alvi) v Secretary of State for the Home Department [2012] UKSC 33)

47. Mr Iqbal submitted, in effect, that the 2012 casework instructed effected a retrospective change to the Immigration Rules and/or that the May 2012 CI fell foul of the principle articulated by the Supreme Court in Alvi , that a "substantive" requirement was determinative of the success or failure of an application, must be contained in Immigration Rules made under section 2 of the Immigration Act 1971.

48. We do not find merit in these submissions. Taking them in reverse order, the May 2012 CI is not a policy that "glosses" or modifies what would otherwise be the operation of the Immigration Rules. It is, as is plain, an instruction to caseworkers to apply the letter of those Rules, as in force on 5 April 2012. In no sense does it impose a requirement, which is not found in the Rules themselves. Accordingly, it does not fall foul of the principle in Alvi .

49. We can see no element of retrospectivity in the May 2012 CI. On the contrary, it seems plain that the appellants' complaint under this heading is not that the changes which took effect on 6 April 2012 were retrospective but, rather, that the respondent did not see fit to afford the appellants and others in their position any transitional relief from those changes. Viewed in that light, the complaint under this heading collapses back into the challenges based on legitimate expectation, proportionality and fairness.

(g) Evidential flexibility

50. It is argued in Mr Iqbal's skeleton and developed by him in oral submissions that the decisions in this case are not in accordance with the law on the basis that the respondent has not applied her evidential flexibility policy. Reference is made to the determination of the Upper Tribunal in Rodriguez (Flexibility Policy) [2013] UKUT 00042 (IAC). It is argued that the policy was brought into play by the respondent contacting the appellant's respective universities and asking for the date of award. It is said that the respondent then failed properly to apply the policy on the basis that, having activated the policy and having obtained the relevant information, the policy was inconsistently applied, in that 20

points were awarded for qualifications but the respondent refused to award 15 points for the date of award.

51. These arguments are addressed in the respondent's skeleton argument and as developed in Mr Gullick's oral submissions. The argument is made first that the respondent did consider the evidence of the qualifications but found them not to meet the Rules and therefore any evidential flexibility policy arguments are irrelevant to these cases. It is further argued that the casework instruction (CI) of May 2012 expressly prevented caseworkers from applying the evidential flexibility policy to Tier 1 (PSW) applications. Third, reference is made to the evidential flexibility policy itself, which it is said makes it plain that it would not be applied to cases such as the instant ones, in that it can be seen from page 3 of the policy that if the application would fall for refusal even if the missing information were provided or minor error corrected, evidence cannot be requested and the application should be refused. The point is made that in these cases even if the award were requested and received it would still be dated after the application was made and therefore would not meet the requirements of the Immigration Rules.

52. We see force in these arguments. Bearing in mind the conclusion in Raju at [24]: "these applicants could not score 75 points because they had made their applications before they had obtained their qualifications", no application of the evidential flexibility policy could assist the appellants on the facts of these cases. Even if it could apply, the 2012 CI made it clear at paragraph 10 that in such cases evidence of the award under the evidential flexibility policy should not be requested, and the point is made also that in fact the evidence was considered by the respondent but was found not to meet the requirements of the Rules. In this regard [22] of Raju is of clear relevance. Accordingly we see no merit to this ground of appeal.

(h) Variation

53. Mr Iqbal and Mr Malik advanced somewhat different submissions, leading to the same asserted result; namely, that the appellants should succeed in their appeals, by reference to the concept of variation of an application. We shall deal with those submissions in turn.

54. In order to appreciate them, it is necessary to set out relevant provisions of section 3C of the Immigration Act 1971:-

"3C. Continuation of leave pending variation decision

(1) This section applies if—

(a) a person who has limited leave to enter or remain in the United Kingdom applies to the Secretary of State for variation of the leave,

(b) the application for variation is made before the leave expires, and

(c) the leave expires without the application for variation having been decided.

(2) The leave is extended by virtue of this section during any period when—

(a) the application for variation is neither decided nor withdrawn,

(b) an appeal under section 82(1) of the Nationality, Asylum and Immigration Act 2002 could be brought, while the appellant is in the United Kingdom against the decision on the application for variation (ignoring any possibility of an appeal out of time with permission), or

(c) an appeal under that section against that decision, brought while the appellant is in the United Kingdom, is pending (within the meaning of section 104 of that Act).

(3) Leave extended by virtue of this section shall lapse if the applicant leaves the United Kingdom.

(4) A person may not make an application for variation of his leave to enter or remain in the United Kingdom while that leave is extended by virtue of this section.

(5) But subsection (4) does not prevent the variation of the application mentioned in subsection (1)(a).

…"

55. Also relevant are paragraphs 34E and 34F of the Immigration Rules:-

"Variation of applications or claims for leave to remain

34E. If a person wishes to vary the purpose of an application or claim for leave to remain in the United Kingdom and an application form is specified for such new purpose or paragraph A34 applies, the variation must comply with the requirements of paragraph 34A or paragraph A34 (as they apply at the date the variation is made) as if the variation were a new application or claim, or the variation will be invalid and will not be considered.

34F. Any valid variation of a leave to remain application will be decided in accordance with the immigration rules in force at the date such variation is made."

56. Mr Iqbal contended that the applicant's submission to the respondent, before she made her decision, of the requisite notification of an award, which had not been supplied on making the original application, constituted a variation of that application. This meant that the respondent was wrong to refuse the application on the basis that the award had not been made prior to the application.

57. Reliance was placed on the determination of the Upper Tribunal in Qureshi (Tier 4 – effect of variation – App C) [2011] UKUT 00412 (IAC). That case concerned a student, who was found effectively to have varied her application by relying on a new sponsoring college, after her existing college lost its licence. The Upper Tribunal held that it was possible to effect a variation of an application by changing an element of an application for leave to remain as a student (in Ms Qureshi's case, a change from Empire College London to Birmingham City University). It was unnecessary for the variation to change the actual purpose of the application, such as had happened in JH (Zimbabwe) v Secretary of State for the Home Department [2009] EWCA Civ 78. The Upper Tribunal held that "the date the respondent is required to take into account for the purposes of determining the points to be awarded under Appendix C, where there has been a variation substituting a new college … is the date of the most recent variation …" [38].

58. Thus, on the authority of Qureshi , one may vary an application made for a specified purpose by changing details, whilst not altering that purpose. JH (Zimbabwe) is authority for the proposition that section 3C of the 1971 Act authorises a variation which changes the nature of the application. But neither of those propositions assists the appellants, for the simple reason that the belated submission of notification of the award cannot in any sense be categorised as a "variation" of their applications. A "variation" requires there to be some change or difference, as compared with the original state of affairs. This did not happen in the case of the appellants (other than Mr Rasheed (appellant (16)) – see below). In Khatel the Upper Tribunal was in no doubt that the post-5 April 2012 submission of material was not a variation:-

"… manifestly this was not a wholly fresh application for a wholly different purpose which was the striking feature of JH (Zimbabwe) but further information in the same application that was received before the decision was taken. There was no attempt to vary the application after the date of decision … [45]

48. In this case there was a single application for a single purpose made before 6 April 2012 but supplemented by data supplied before the decision was made."

59. Nothing in the judgments in Raju calls those findings of the Upper Tribunal into question. We agree with them.

60. Mr Malik's client, Mr Rasheed, originally applied on the basis of ACCA qualifications. Following the case of Sayed (see [39] above) Mr Rasheed's application could not succeed by reference to those qualifications. On 25 May 2012, before receipt of the respondent's decision, Mr Rasheed informed the respondent that he now wished to rely on his Master of Science degree certificate, awarded that day, rather than on his ACCA qualifications.

61. It would seem strange that Mr Rasheed should be in a better position than the other appellants who, after all, had not sought to rely on inherently invalid qualifications. In fact, we do not consider that such a result follows because we accept the respondent's submission that paragraph 34F of the Immigration Rules applies to Mr Rasheed's variation. Paragraph 34F is also destructive of the other appellants' cases, were the view to be taken that their post-5 April 2012 notifications constituted variations of their applications.

62. We reject the appellants' submissions that paragraph 34F applies only to variations of the purpose of an application etc; that is to say, an application falling within paragraph 34E. By referring to variation of the purpose of an application, the drafter at paragraph 34E must be taken to acknowledge that there may be variations that do not amount to changes of purpose. Furthermore and in any event, it would have been open to the drafter of paragraph 34F to refer expressly to the purpose of an application, had the intention been to restrict that paragraph to variations of purpose.

63. Accordingly, even if we accepted that there were variations, the appellants' "varied" applications would, by reason of paragraph 34F, fall to be decided "in accordance with the immigration rules in force at the date such variation is made". Since this would be after 5 April 2013, none of the appellants could succeed. Their cases depend on bringing themselves within the Rules as in force at 5 April.

64. Mr Malik submitted that "a variation need not be in accordance with paragraph 34E of the Immigration Rules for it to be an effective variation of the purpose of section 3C(5) of the 1971 Act". We agree; but, for the reasons we have given, this does not assist Mr Rasheed. There is, in short, no conflict between what section 3C has to say about the variation of an application to vary leave to remain and what paragraph 34F of the Immigration Rules says about the process by which a variation application is to be decided.

(i) Ms Heybroek's submissions; UG (Nepal) v Entry Clearance Officer [2012] EWCA Civ 58

65. Ms Heybroek's submissions require separate consideration. She contended that the judgments of the Court of Appeal in Pankina v Secretary of State for the Home Department [2010] EWCA Civ 719 and AQ (Pakistan) meant that evidence regarding the notification of an award was evidence relevant to the substance of the decision; and that the relevant date for assessment of that evidence was, in fact, the date of decision.

66. We reject that contention. It seeks to erase the important distinction, emphasised by Moses LJ in Raju , between the requirements of the Rules and the evidence that may be adduced to demonstrate compliance with those requirements. The Court of Appeal has found that the requirement as to notification had to be satisfied at the date of application, construed in accordance with paragraph 34G. Evidence which shows that notification occurred after that date, although it may be admissible, cannot prove compliance with that requirement.

67. Ms Heybroek pointed out that it took until 27 May 2012 for the respondent to issue the casework instruction, which was said to be valid from 6 April 2012. However, even if it could be said that the July 2010 policy survived until 27 May 2012, this would not assist any of the appellants, since the respondent's decisions in their cases were not taken until September, October and December 2012. In any event, the basic point remains that the Immigration Rules changed on 6 April 2012 in a fundamental respect; that that change had been publicly announced in advance; and that the rationale for the July 2010 "pragmatic" policy disappeared with that change.

68. Whilst on this topic, it is convenient to mention that Mr Iqbal, in his submissions, indicated that he could have no complaint with the May 2012 CI, had it come into force on 5 April 2012. We confess to having difficulty understanding Mr Iqbal at this point. The May 2012 CI, in our view, correctly identifies the demarcation line between 5 and 6 April 2012.

69. Ms Heybroek sought to rely on the judgments of the Court of Appeal in UG (Nepal) v Entry Clearance Officer [2012] EWCA Civ 58. UG (Nepal) concerned the application of policies relating to the settlement of the adult dependents of Ghurkhas granted indefinite leave to enter the UK, following service in the British army. Ms Heybroek relied upon this passage from [28] of the judgment of Tomlinson LJ:-

"Accordingly, I am satisfied that in each case considerations both of fairness and of coherent decision making require that the applications be remitted for reconsideration by the ECO. The ECO should in each case apply the policy which was in force as at the date of the respective applications, but he should apply it to the facts as he finds them to be at the date of his decision."

70. We are in no doubt that, in the passage just cited, Tomlinson LJ was not seeking to lay down a general legal principle, to the effect that a decision maker in the immigration context must always apply the policy (if any) which was in force at the date of the application. Were this not so, an anomaly would arise between, on the one hand, the application of policies and, on the other, the application of the Immigration Rules themselves. In Odelola , the House of Lords held that (absent transitional provisions requiring a contrary result), a decision maker must determine an application by reference to the Immigration Rules in force at the date of his or her decision, rather than the Rules in force when the application was made. In doing so, the majority drew on the fact that the Immigration Rules are themselves "essentially statements of policy" [34] and drew the analogy with planning law, where applications fall to be determined in accordance with whatever policies are in force at the date of decision: [38] and see [29] above. In the present cases, the respondent was entitled to proceed on the basis that the rationale for the July 2010 policy disappeared on 6 April 2012 and advise her decision makers accordingly. We also observe that, if Ms Heybroek's submission were right, then the judgments in Raju must be wrong. We are, of course, bound by those judgments; but, in any event, we reject the submission made by reference to UG (Nepal) .

71. Relying on paragraph 9 of Messrs Morgan Marks's response to the Upper Tribunal's "rule 45" directions, Ms Heybroek submitted that there was an inconsistency between the approach of the respondent in the cases of the appellants, and her attitude towards documentation required by those

applying under the Tier 1 (Entrepreneur) route, where the respondent's "evidential flexibility" policy extended to seeking "missing information from the required letters/documents". We reiterate what we have said at [50] to [52] above regarding the inability of evidential flexibility to assist the appellants. In any event, the position of entrepreneurs is markedly different from that of former students, seeking to follow the Post-Study Work route. As we have seen, the respondent decided that the policy in respect of the latter had proved to be unsuccessful. No simultaneous view was taken of entrepreneurs. The appellants have not demonstrated any irrationality on the part of the respondent, as regards her treatment of these two classes.

J. Section 85A of the Nationality, Immigration and Asylum Act 2002

72. At [18] and [19] above, we have recorded how the respondent's stance before the Upper Tribunal in Khatel relied upon section 85A of the 2002 Act, in which Exception 2 was said to have the effect of restricting the Tribunal to the consideration of evidence, which was submitted in support of, and at the time of making, the application concerned. We have also seen that, before the Court of Appeal in Raju , the respondent put her case on the substantive requirements of the Rules. In the present cases, much of Mr Iqbal's skeleton argument was taken up with an analysis of section 85A. In the event, like the Court of Appeal, we have resolved the issues before us without reference to the meaning or effect of section 85A. Nevertheless, we agree with Counsel for the appellants that, in the circumstances, it would be helpful to explain why this is so, and in particular, to set out the stance of the respondent, both in Raju and before us.

73. Paragraph 29 of Mr Gullick's skeleton argument for the respondent in Raju reads as follows:-

"29. Whilst the SSHD accepts, having further considered the position in the light of the Upper Tribunal's judgment, that following the coming into force of section 85A of the 2002 Act, an application is to be treated as continuing for evidential purposes after it is initially submitted to the SSHD (and so an applicant can provide further evidence, in addition to that initially submitted, prior to the SSHD's decision), the question of where the cut-off point in the ' fixed historic timeline' for the award of points should fall is a somewhat different one." (original emphases)

74. Mr Gullick's skeleton argument in the present contains this paragraph:-

"41. It is clear … that the SSHD has never suggested in this appeal that the SSHD is not entitled to consider post-submission but pre-decision evidence. The SSHD has also made it clear that, in any event, the Tribunal is entitled to consider the evidence that the decision maker considered. Such evidence **was considered in these cases** (and in the Raju cases), but did not result in the award of 15 points for the reasons given in Raju ." (original emphasis)

75. In the light of the respondent's position, there is a considerable amount of agreement between Mr Gullick and Mr Iqbal. In particular, they agree on what is meant by the expression "the application" in section 85A. They disagree, however, about whether section 85A imposes any substantive restriction on the ability of the respondent to consider evidence submitted after the date on which the application is made for the purposes of the Rules (pursuant to paragraph 34G). We agree with the respondent that section 85A imposes no such restriction.

76. Accordingly, the respondent's position, in cases such as the present, is that (as held in Khatel) section 85A precludes a Tribunal, in a points-based appeal, from considering evidence as to compliance with points-based Rules, where that evidence was not before the respondent when she took her decision; but the section does not prevent a tribunal from considering evidence that was

before the respondent when she took the decision, whether or not that evidence reached the respondent only after the date of application for the purposes of paragraph 34F. Although our view of the matter is obiter , we concur.

K. What constitutes notification of an award for the purposes of the Rules?

77. Mr Jafar raised an argument concerning the meaning of the terms “award” and “institution” in the Immigration Rules and the Guidance. In particular, he relied upon paragraphs of the Guidance, which we have set out at paragraph [15] above.

78. It is important to be clear that two separate substantive requirements of the Immigration Rules are in play. See Table 10 following paragraph 68 of Appendix A, set out at [12] above: 20 points can be awarded for the relevant qualification and 15 points can be awarded if the qualification was obtained within the twelve months immediately before the applicant’s application for entry clearance or leave to remain etc.

79. With regard to Mr Jafar’s argument that the meaning of the word “award” is unclear, we consider that this is sufficiently established at paragraph 79 of the Guidance. The date of award is as set out: the date on which the applicant was first notified, in writing, by the awarding institution, that the qualification has been awarded. This has to be seen together with paragraph 80, which makes it clear that the date of graduation is not accepted as the date of award. Although these matters are concerned with dates of award rather than definition of the term “award”, it seems to us sufficiently clear that what is referred to here is the conferring of the degree, whether in person or in absentia, on the person who has fulfilled the requirements of that degree. We do not accept that the terminology employed in the May 2012 CI at paragraph 6 (see [16] above) is other than a paraphrase of paragraph 79 of the Policy Guidance set out above. It would be surprising if a Casework Instruction issued on 23 May 2012 concerning applicants who had applied before 6 April 2012 prior to their qualification being awarded would be intended to differ materially from the terms of Guidance which was in force immediately before 6 April 2012.

80. As regards the meaning of the term “institution” it is clearly the case that it is the awarding institution rather than, as is the case for many of these appellants, the institution at which the particular applicant studied. Notification therefore by the college at which the applicant studied if it is not the awarding institution will not suffice for the purposes of the obtaining of 15 points. A degree which is awarded under the aegis of an institution such as the University of London or the University of Wales is a degree which is awarded by that institution and matters such as the certificate of award and the date of award are as a consequence of significance. By contrast, one can see from paragraph 83 of the Guidance, as regards the documents required, that an original document from the institution at which the applicant studied is a prerequisite, and that is to be contrasted with the need to prove notification from the awarding institution in order to establish the date of award.

81. It is the case that paragraph 83(a), which speaks of “the institution at which the applicant studied towards his/her eligible qualification”, suggests that the institution there referred to is the institution at which the applicant worked towards his or her University degree: eg the London College of Business, as opposed to the University of Wales, in the case of Mr Nasim (appellant (1)). But we do not consider that such an interpretation of the expression “institution” in paragraph 83(a) is right. All that provision is doing is to specify what documentation is required in order to demonstrate notification under paragraph 79; and that notification, as we have seen, is notification by “the awarding institution”. In any event, paragraph 83(a) cannot, we find, alter the plain meaning of those words in paragraph 79.

L. Rule 45

82. Mr Malik has argued in his skeleton argument that it is not open to the Tribunal to review its decision in these cases under rule 45(1)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008, since the criteria in that sub-paragraph are not met. Review is only permissible under the sub-paragraph 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.”

83. Mr Malik’s first argument is that Raju does not bind the Upper Tribunal since it is in conflict with JH (Zimbabwe) and QI (Pakistan) [2011] EWCA Civ 614, in light of the guidance in Young v Bristol Aeroplane Co Ltd [1944] KB 718.

84. Mr Malik’s further argument is that Raju , had it been decided before the Upper Tribunal’s decisions, could not have had a material effect because, unlike the cases of Mr Gambo (appellant (14)) and Mr Rasheed (appellant (16)), both of whom Mr Malik represents, there were no variations in Raju . He makes the further point that in any event Raju purely concerned Table 10 of Appendix A, which set out the substantive requirements for leave to remain as a Tier 1 (Post-Study Work) Migrant. Mr Gambo’s case, as Mr Malik points out, has nothing to do with Appendix A but was concerned with Appendix C. Accordingly, the only power available to the Tribunal is to grant the respondent permission to appeal to the Court of Appeal.

85. Young v Bristol Aeroplane established, among other things, that the Court of Appeal is entitled and, indeed, required to decide which of two conflicting decisions of its own it will follow. Certainly, the Upper Tribunal is bound by decisions of the Court of Appeal (including, of course, Young v Bristol Aeroplane), and we think it must follow that if we are faced with conflicting decisions of that Court, we, like it, are required to decide which one we will follow.

86. The next question, of course, is whether Raju is in conflict with JH (Zimbabwe) and QI (Pakistan) . As regards the former, we take the ratio to be as set out at [40], in the judgment of Richards LJ, that a later application is capable of being treated as a variation of the first application, even if it is for a different purpose and on a different form.

87. The Court, at [35], clarified the meaning of section 3C of the Immigration Act 1971:

“The section applies, by subs.(1), where an application for variation of an existing leave is made before that leave expires (and provided that there has been no decision on that application before the leave expires). In that event there is, by subs.(2), a statutory extension of the original leave until (a) the application is decided or withdrawn, or (b) if the application has been decided and there is a right of appeal against that decision, the time for appealing has expired, or (c) if an appeal has been brought, that appeal is pending … During the period of the statutory extension of the original leave, by subs.(4) no further application for variation of that leave can be made. Thus, there can be only one application for variation of the original leave, and there can be only one decision (and, where applicable, one appeal). The possibility of a series of further applications leading to an indefinite extension of the original leave is excluded. However, by subs.(5) it is possible to vary the one permitted application. If it is varied, any decision (and any further appeal) will relate to the application as varied. But once a decision has been made, no variation of the application is possible since there is nothing left to vary.”

88. This interpretation was endorsed by the Court in QI (Pakistan) . As we explained at [53] to [64] above, the belated submission of notification of the degree award in these cases cannot be categorised as a “variation” of the appellants’ applications. There is no disagreement in Raju with the view expressed by the Upper Tribunal at [45] of Khatel that the post-5 April 2012 submission of material was not a variation. Hence we see no conflict between either JH (Zimbabwe) or QI (Pakistan) and Raju , and consequently we are free to follow Raju , which we do.

M. The individual cases

89. We set out below the salient aspects of the cases of each appellant.

(1) Muhammad Nasim

90. Mr Nasim applied by reference to a Master of Business Administration degree from the University of Wales. A letter of 20 March 2012 from the London College of Business described him as being “enrolled into our Advanced Entry MBA programme as a part-time student commencing from 05/09/2011. The student has submitted his dissertation on 1 February 2012, for which the results are still awaited”. A “confirmation of course completion” from the London College of Business dated 29 May 2012 described the appellant as having successfully completed the MBA programme, and that he had “completed all requirements for the award of Master of Business Administration. The University of Wales will award the degree certificate to Mr Nasim in July 2012”. A copy of the degree certificate shows, in fact, that the degree was awarded by the University of Wales on 30 May 2012. The respondent refused the appellant’s application on 28 December 2012. In his grounds of appeal, the appellant asserted that the immigration decision “infringes the appellant’s rights arising under the Human Rights Act”.

(2) Tahir Mahmood

91. Mr Tahir made his application by reference to a Master of Business Administration degree from the University of Wales. A letter from City of London College dated 23 September 2011 confirmed that the appellant would be studying for that degree over “7 months”, beginning on 12 September 2011 and ending on 9 March 2012 (sic), with a “result date” of 30 March 2012. A document from the University of Wales dated 16 August 2012 indicates that the appellant studied for the degree at City of London College, commencing there on 12 September 2012 and completing the course on 16 April 2012. He was awarded the qualification on 2 May 2012. The respondent refused the appellant’s application on 18 September 2012. In his grounds of appeal the appellant raised Article 8 of the ECHR. In his grounds of appeal, the appellant asserted that the immigration decision “infringes the appellant’s rights arising under the Human Rights Act”.

(3) Muhammad Taimoor Ahmad

92. Mr Ahmad’s application was made by reference to a Master of Arts degree in “Marketing and Innovation (Top-Up)” awarded by Anglia Ruskin University. A letter dated 2 April 2012 from LS Business School stated that the appellant “has successfully submitted all required assignments for the above qualification … first assignment marks indicate that the student has passed these modules … please be aware that the final transcript will be made available by Anglia Ruskin University on 20 July 2012”. A “student results view” in respect of the appellant appears to have been enclosed with the letter of 2 April. This student results view was issued by Anglia Ruskin University and stated that the appellant had passed the modules in question. On 17 September 2012 an email from Anglia Ruskin University to the UKBA confirmed that the appellant “was awarded a Master of Arts in Marketing and

Innovation on 6 July 2012. According to our records, the student studied with LSM from 13 February 2012 to 6 July." The respondent refused the appellant's application on 19 September 2012. The appellant's grounds of appeal to the First-tier Tribunal do not refer to human rights.

(4) Ahsan Khalid

93. Mr Khalid made his application by reference to a Masters of Science degree in Management Information Systems awarded by Coventry University. The documentation submitted with the application makes it plain that the appellant did not pass his dissertation module at the first attempt. A letter from Coventry University dated 22 March 2012 indicated that the appellant would have to resubmit his dissertation on 27 April 2012. The appellant was awarded his MSc degree in July 2012, producing a certificate to that effect. The respondent refused the appellant's application on 17 September 2012. The appellant did not raise human rights in grounds of appeal to the First-tier Tribunal but his new solicitors, Messrs Malik & Malik, did so in response to the Upper Tribunal's directions given at the hearing on 8 October (see below).

(5) Ahsan Naeem

94. Mr Naeem made his application by reference to a Masters of Business Administration degree awarded by the University of Wales. A letter from City of London College dated 29 March 2012 records that the appellant "has successfully completed the required modules of the programme and has also been successful in the internal results of the dissertation. External examiner has confirmed students (sic) successful completion of a dissertation which now awaits formal recording at the university within the next few days". A document from the University of Wales dated 20 June 2012 records what appears to be the successful completion by the appellant of nine courses. There is also a "diploma supplement" issued by the University of Wales. This discloses that its purpose is "to provide sufficient recognition of qualification (diplomas, degrees, certificates etc). It is designed to provide a description of the nature, level, context, content and status of the studies that were pursued and successfully completed by the individual named on the original qualification to which this supplement is appended". The document describes the "date of award" of the degree as 2 May 2012. A further document from the University dated 10 May 2012 describes the course as running from 7 November 2011 to 27 April 2012 and that the appellant achieved a pass in respect of the MBA degree.

95. The appellant's bundle includes this from the UKBA:-

"On 22 March 2011, following a public student immigration system consultation, the government announced that the Tier 1 (Post-Study Work) route would close in April 2012. A formal closure date of 5 April was published in the Statement of Changes on 15 March 2012. Further notice was subsequently placed on the UK Border Agency on 3 April which advised applications:

'Any application submitted on or before 5 April 2012, will be considered under the Rules and Guidance in force on 5 April 2012. You must ensure that you can meet the full criteria before applying. These criteria are set out in the Tier 1 (Post-Study Work) policy guidance .

If you have not completed your studies, or have not received confirmation that you have been awarded a qualification, you do not meet the criteria and any application for Tier 1 (Post-Study Work) will be refused.'"

96. The footnote for the last quotation is:

" www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/2012/april/16-tier1-psw-route-closing "

97. The respondent refused the appellant's application on 25 September 2012. In his grounds of appeal, the appellant asserted that the decision was unlawful because it was incompatible "with the appellant's Article 8 under the ECHR" (sic).

(6) Rizwan Bashir

98. Mr Bashir made his application by reference to a Masters of Business Administration Top-Up, awarded by the University of Wales. A letter dated 20 February 2012 from Birmingham Graduate School confirms that he "has completed his full-time MBA top-up programme. He has completed all his academic requirements. His course began on 10 October 2011 and ended on 20 February 2012. The student is expected to receive a certificate from the University of Wales shortly". The certificate from the University of Wales is dated 30 May 2012 and the diploma supplement (see above) also gives the date of award as 30 May 2012, although the certification appears to be dated 20 July 2012. The respondent refused the appellant's application on 24 September 2012. The appellant did not raise human rights in his grounds of appeal to the First-tier Tribunal but has done so in response to the directions given by the Tribunal on 8 October.

(7) Muhammad Arif Mughal

99. Mr Mughal made his application by reference to a Masters of Arts in Marketing and Innovation, awarded by Anglia Ruskin University. The course was said to commence on 13 February 2012 and to last six months. The degree was not awarded until 6 July 2012. A letter, which the First-tier Tribunal assumed had been submitted as part of the application, from the London School of Marketing dated 2 April 2012 stated that "first assignment marks" indicated that the appellant had passed his modules; but went on to state that the results were subject to University validation.

100. The respondent refused the appellant's application on 20 September 2012. The appellant raised human rights in his grounds of appeal.

(8) to (12) The family members of Muhammad Arif Mughal

101. These linked appeals, from dependants of Mr Mughal, fall to be decided under the Rules in line with his application. It is contended by Messrs Morgan Mark that the children of Mr Mughal, born in the United Kingdom, are both profoundly deaf and that, if necessary, permission is sought to adduce evidence regarding this matter. We grant that permission, pursuant to rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

(13) Danisha Ejaz Qureshi

102. Mr Qureshi made his application by reference to a Masters of Business Administration Top-Up degree from the University of Wales. A letter from Birmingham Graduate School dated 18 May 2012 confirmed that the appellant "has successfully completed his MBA in International Management which is awarded by University of Wales." The "end date" was said to be "01/02/2012" and the "date of award" was "30/05/2012". The letter stated that the appellant "will be issued with an official certificate and transcript in due course from the University of Wales". In fact, the actual grant of the award was 20 September 2012. The respondent refused the appellant's application on 21 September 2012. In his grounds of appeal, the appellant asserted that the decision was "contrary to the provisions of the European Convention on Human Rights Act" (sic).

(14) Ja'Afar Dori Gambo

103. It is unnecessary to say more about Mr Gambo's appeal than that, at the hearing on 8 October 2013, Mr Gullick accepted that the requisite notification of award had been supplied to the respondent with the application prior to 6 April 2012. It was accepted that Mr Gambo satisfied the relevant requirements of the Rules. Accordingly, the judgments in Raju can have no effect on the correctness of the determination of Deputy Upper Tribunal Judge McCarthy, allowing the appellant's appeal following a hearing on 19 February 2013. We decline to review that determination, pursuant to rule 45. We hereby refuse the respondent's application for permission to appeal to the Court of Appeal against the determination of the Deputy Judge.

(15) Rehan Anwar

104. Mr Anwar made his application by reference to a Higher National Diploma in Business Administration awarded by Heriot-Watt University. He was studying for this at West London College. A letter dated 13 March 2012 from Heriot-Watt University confirmed that the appellant "registered on the programme in June 2010 and has since met the requirements to be awarded a Diploma of Higher Education". The diploma submitted to the respondent is dated 31 May 2012. The respondent refused the appellant's application on 28 September 2012. The appellant did not raise human rights in his grounds of appeal to the First-tier Tribunal.

(16) Asif Rasheed

105. As we have already noted, Mr Rasheed originally based his application on an ACCA qualification but subsequently varied that application so as to rely, instead, on a Master of Science degree in International Accounting from Anglia Ruskin University, and a Bachelor of Science degree in Applied Accounting from Oxford Brookes University. A letter from Anglia Ruskin University dated 1 June 2012 congratulates the appellant "on completing your pathway. At its meeting held on Friday 25 May 2012 the Anglia Ruskin Awards Board confirmed your final award as: Master of Science International Accounting Pass". A letter dated 26 September 2012 from Oxford Brookes University records that "following the decision of the Oxford Brookes University BSc (Hons) in Applied Accounting examination board held on 24 Sep 2012, I am pleased to inform you that your research project has achieved a grade C and you have subsequently been awarded the BSc (Hons) in Applied Accounting degree with LOWER SECOND CLASS HONOURS. Oxford Brookes will send your BSc degree certificate to you by post within the next 3 months". The respondent refused the appellant's application on 27 September 2012. In his grounds of appeal, the appellant contended that his appeal should be allowed "on the basis of Article 8"; but at the hearing on 8 October, Mr Malik informed us that his client was not now relying on Article 8.

(17) Kazi Mosharrof Hossain

106. Mr Hossain made his application by reference to a Masters of Business Administration degree awarded by the University of Wales. A letter dated 29 March 2012 from City of London College (with whom the appellant was studying) stated that he "has successfully completed the required modules of the programme and has also been successful in the internal results with the dissertation. External examiner has confirmed students (sic) successful completion of the dissertation which now awaits formal recording at the University within the next few days". An email from the University of Wales to the UKBA dated 13 September 2012 records the date of completion of the studies as "16/04/2012" and the "date of award" as "02/05/2012". The respondent refused the appellant's application on 27 September 2012. In his grounds of appeal, the appellant submitted that "his rights under Article 8 of the ECHR were not considered adequately by the respondent. The appellant has already established

private life here in the UK within the meaning of Article 8 of the ECHR through the course of his studies in the UK".

(18) Androo Haji Rafeek

107. Mr Rafeek made his application by reference to a Masters of Business Administration degree awarded by the University of Northampton. A "certificate of introduction to UK banking facilities 2010/2011" dated 22 February 2011 from the University confirmed that the appellant was enrolled as a student on the MBA course, said to be due to finish on 6 January 2012. A letter from the University dated "July 2012" informed the appellant that "on 23 July 2012 the Senate of the University of Northampton awarded you a Masters of Business Administration Pass Congratulations!" A "transcript of studies" from the University dated August 2012 gave details of the grades achieved in the ten courses relevant to the degree. The respondent refused the appellant's application on 27 September 2012. In his grounds of appeal, the appellant contended that his rights under Article 8 of the ECHR should have been considered. He had built up social ties and a private life in the UK.

(19) Qummer Aziz

108. Mr Aziz made his application by reference to a Masters of Business Administration degree awarded by the University of Wales. A letter from that University dated 16 April 2012 informed the appellant that he had been successful in his candidature and would be admitted to his degree in absentia. An email from the University to UKBA on 13 September confirmed the appellant being awarded the MBA. The "date of award" was said to be "02/05/2012" and the "date of completion" was "16/04/2012". The respondent refused the appellant's application on 27 September 2012. The appellant did not raise human rights grounds in his grounds of appeal but the determination of the First-tier Tribunal deals with human rights, suggesting that such grounds had been raised at the hearing.

(20) Abhilash Mukundhakshan

109. Mr Mukundhakshan made his application by reference to a Masters of Business Administration degree in Information Technology, awarded by Coventry University. A letter dated 2 April 2012 from that University recorded that the appellant had enrolled on his one year course on 3 October 2011, with a finish date of 8 June 2012 and "expected graduation date" of July 2012. A further document from Coventry University dated 26 June 2012 informing the appellant that he had been awarded an MBA degree. The degree certificate is dated "July 2012". There was also a letter from Coventry University dated 29 June 2012 stating that the appellant "has been awarded a Master of Business Administration in Information Technology". This letter, however, although referring to the course as one year in duration, gives a start date of 25 January 2010 and a "finish date" of 8 June 2012. The respondent refused the appellant's application on 26 September 2012. The appellant raised Article 8 in his grounds of appeal, contending that the decision constituted a disproportionate interference with his private life and that of his dependant. In its determination, the First-tier Tribunal made an anonymity direction in respect of the appellant. We can discern no reason for this direction, which we accordingly rescind.

(21) Sandeep Kaur

110. Ms Kaur made her application by reference to a Master of Arts degree in Marketing and Innovation awarded by Anglia Ruskin University. According to [3] of the First-tier Tribunal's determination, with her application the appellant submitted a letter from the London School of

Management “confirming that he (sic) had submitted all required assignments for her qualification”. An email from the University to the UKBA dated 17 September 2012 confirms that the appellant “was awarded a Master of Arts in Marketing and Innovation on 6 July 2012”. The studies and exam took place at London School of Marketing (LSM) and the degree was accredited by Anglia Ruskin University. According to our records, the student studied with LSM from 12 September 2011 to 6 July 2012”. The respondent refused the appellant’s application on 27 September 2012. In her grounds of appeal, the appellant asserted that the decision violated her rights under Article 8 of the ECHR.

(22) Sajid Abdul

111. Mr Abdul made his application by reference to a Master of Arts degree in Marketing and Innovation (Top-up) awarded by Anglia Ruskin University. A letter from LS Business School dated 4 April 2012 stated that the appellant “has submitted all required assignments for the above qualification on 23 March 2012”. The start date for the course was said to be 16 January 2012. It appears that the only other relevant date is 6 July 2012, when the appellant was awarded his qualification ([5] of the First-tier Tribunal’s determination). The respondent refused the appellant’s application on 1 October 2012. In his grounds of appeal, the appellant asserted that the decision violated his rights under Article 8 of the ECHR.

N. Applying our findings to the appellants’ individual cases

112. Applying our findings in Parts I, K and L above to the individual facts as set out in Part M above, we hereby find that, with the exception of Mr Gambo (appellant (14)), they have all failed to show that the variation decisions against which they appealed were not in accordance with the law, including the Immigration Rules, for any of the reasons advanced by them and recorded in those Parts. They have also failed to show why, in the light of this, rule 45 should not be invoked so as to set aside the determinations of the Upper Tribunal, against which the respondent sought permission to appeal to the Court of Appeal. We do so. In the case of Mr Nasim (appellant (1)), the determination of the First-tier Tribunal allowing his appeal contains an error of law and we have decided to set the determination aside.

113. The stage is, accordingly, reached in all the cases before us where the Upper Tribunal must decide whether the First-tier Tribunal’s determinations involved the making of an error on a point of law. In all but two cases, the findings we have made in Parts I, K and L make it plain that the determinations did involve such errors, whether by allowing the appeal against the decision to refuse to vary leave; by dismissing the appeal against the section 47 removal decision; or by not engaging with the section 47 appeal at all. In all of these cases, the First-tier Tribunal’s determinations fall to be set aside, with the result that the decisions in the appeals against the respondent’s immigration decisions need to be re-made.

114. In two cases (Mr Aziz (appellant (19)) and Mr Mukundhakshan (appellant (20))) the First-tier Tribunal dismissed the appeal against the variation decision but allowed the appeal against the section 47 decision. In the light of our findings, that result is legally correct, so far as concerns all issues other than (possibly) Article 8 of the ECHR.

115. As can be seen, all the appellants except three wish to rely on Article 8 of the ECHR, either having done so in the previous course of proceedings in their appeals or by responding to the directions given by the Upper Tribunal at the hearing on 8 October. We indicated at that hearing that we would not in this decision deal with any discrete Article 8 matter, by which we mean a submission to the effect that, even though the immigration decision may otherwise be in accordance with the law,

including immigration rules, the appellant and/or his family have a protected private or family life in the United Kingdom, such that the hypothetical removal of the appellant in consequence of the immigration decision would constitute a disproportionate interference with that private or family life.

116. It therefore follows that, in the case of the three appellants who are not relying on Article 8 (namely, Mr Ahmad (appellant (3)), Mr Anwar (appellant (15)) and Mr Rasheed (appellant (16))), the decisions in their appeals fall to be re-made by, in each case, dismissing the appeals brought against the decisions of the respondent to refuse to vary leave to remain but allowing the appeals against the decisions purportedly made under section 47 of the 2006 Act to give directions for their removal from the United Kingdom. In each case, the appellant awaits a lawful removal decision from the respondent (see paragraph [6] above).

117. In the other remaining cases, we shall reconvene to complete the proceedings by reference to the appellants' Article 8 submissions. The appellants are **hereby directed** to serve on the Upper Tribunal and the respondent, not later than 14 days from the date this decision is sent, all written submissions and written evidence (including witness statements) on the issue of Article 8, upon which they will seek to rely at the reconvened hearing (where necessary, complying with rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008). Each case will be set down for hearing with a time estimate of 30 minutes (with appellants (7) to (12) being treated as a single case for this purpose). In the case of appellants (19) and (20), the forthcoming hearing will concern whether the First-tier Tribunal's determination involved making an error of law as regards Article 8 and, if so, how the appeal should be re-made in respect of that issue.

118. For ease of reference, therefore:

Appellant (1) (Mr Nasim)

The determination of the First-tier Tribunal contains a material error of law. We set the determination aside. We re-make the decision in the appeal against the respondent's immigration decisions by allowing the appellant's appeal against the section 47 removal decision and by dismissing the appeal against the variation decision, so far as that decision was asserted to be not in accordance with the law on any ground other than Article 8 of the ECHR. Whether the appeal against the variation decision should be allowed or dismissed on Article 8 grounds will be decided following the forthcoming hearing.

Appellants (2), (4) to (13), (17), (18), (21) and (22) (Messrs Mahmood, Khalid, Naeem, Bashir, Mughal (and family), Qureshi, Hossain, Rafeek, Ms Kaur and Mr Abdul)

The determinations of the Upper Tribunal, allowing the appellants' appeals, are set aside pursuant to rule 45 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

The determinations of the First-tier Tribunal are set aside for error of law.

We re-make the decisions in the appeals against the respondent's immigration decisions, in each case, by allowing the appellants' appeals against the section 47 removal decisions and by dismissing the appeals against the variation decisions, so far as those decisions were asserted to be not in accordance with the law on any ground other than Article 8 of the ECHR. Whether the appeals against the variation decisions should be allowed or dismissed on Article 8 grounds will be decided following the forthcoming hearing.

Appellants (19) and (20) (Messrs Aziz and Mukundhakshan)

The determinations of the Upper Tribunal, allowing the appellants' appeals, are set aside pursuant to rule 45 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

The determinations of the First-tier Tribunal, dismissing the appeals against the variation decisions but allowing them against the section 47 removal decisions, do not involve an error of law, so far as those determinations are asserted be wrong in law on any ground other than Article 8 of the ECHR. Whether those determinations are wrong in law and should be set aside on Article 8 grounds will be decided following the forthcoming hearing, as will any consequential re-making of the decision in the appeal against the variation decisions.

Appellants (3), (15) and (16) (Messrs Ahmad, Anwar and Rasheed)

The determinations of the Upper Tribunal, allowing the appellants' appeals, are set aside pursuant to rule 45 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

The determinations of the First-tier Tribunal are set aside for error of law.

We re-make the decisions in the appeals against the respondent's immigration decisions by, in each case, allowing the appellants' appeals against the section 47 removal decisions and by dismissing the appeals against the variation decisions.

Appellant (14) (Mr Gambo)

We refuse the respondent's application under rule 44 of the Tribunal Procedure (Upper Tribunal) Rules 2008 for permission to appeal against the determination of the Upper Tribunal, allowing the appellant's appeal.

119. Both of us have contributed to the preparation of this decision.

Signed Date

Upper Tribunal Judge Peter Lane