



IAC-FH-AR-V1

**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/14647/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 18<sup>th</sup> August 2015**

**Decision & Reasons Promulgated  
On 21<sup>st</sup> August 2015**

**Before**

**DEPUTY JUDGE OF THE UPPER TRIBUNAL HUTCHINSON**

**Between**

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

Appellant

**and**

**HAKIM ACHOU  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Ms A Fijiwala, Home Office Presenting Officer  
For the Respondent: Mr C Jacobs, Counsel, instructed by BMAP

**DECISION AND REASONS**

**The Appeal**

1. This is an appeal against the decision promulgated on 1 May 2015 of First-tier Tribunal Judge Munonyedi who allowed the Appellant's appeal against the decision of 13 March 2014 to remove the appellant from the UK. The Appellant in this case is the Secretary of State. For the purposes of this decision I refer to the parties as they were in the First-tier Tribunal.
2. In summary, the Appellant is a citizen of Algeria born on 29 August 1971. On 14 January 2013 he applied for indefinite leave to remain in the United

Kingdom for reasons outside of the Immigration Rules. The basis of the Appellant's claim was that he had entered the United Kingdom in June 1997 using a French identity card and had remained in the UK living and working here in an assumed name.

3. The Respondent, in the decision dated 13<sup>th</sup> March 2014, refused the Appellant's application for indefinite leave to remain for reasons outside of the Immigration Rules. The Appellant had argued that his former solicitors, McClee and Co., had been paid to make an application for him on 11<sup>th</sup> January 2012. The Respondent noted that the Appellant had three failed application attempts before the withdrawal of the fourteen year long residence rules in July 2012: the first being refused on 1<sup>st</sup> March 2012. The respondent accepted that the Appellant's former representatives had been closed down, but considered that the Appellant had over four months to make a valid application after the first refusal and did not do so. The Respondent noted that the Appellant's former representatives sought to make applications but payment was declined. The Respondent did not accept that discretion could be applied in the Appellant's case and stated that they were unwilling to consider the Appellant's application under the withdrawn long residency rules
4. The appeal came before Judge of the First-tier Tribunal Munonyedi on 27<sup>th</sup> March 2015. The judge made clear findings that, contrary to the Respondent's position, the Appellant had been continuously in the United Kingdom since June 1997.
5. Having made that finding, the judge accepted the appellant's evidence as to his dealings with his former solicitor and went on to consider whether or not it was reasonable for the Respondent not to exercise her discretion. The judge considered the case of **Teisha Forrester v Secretary of State [2008] EWHC 2307 (Admin)**. The judge also had regard to the case of **Thakur (PBS - common law fairness) Bangladesh [2011] UKUT 00151 (IAC)**, in relation to the common law duty of fairness. The First-tier Tribunal Judge found that the Appellant had made what he believed to be a bona fide application in January 2012, was unaware of the failure of his former representatives to make that application until November 2012 and was left in a position without a proper application before the Respondent. It was the judge's position that if the application had been properly made and payment accepted in January 2012 that it was more likely than not that the Appellant would have been granted indefinite leave to remain in the UK, under the then Immigration Rules paragraph 276B.
6. However, the judge then went on to quash the Respondent's decision and purported to allow the appeal outright.
7. The Secretary of State applied for permission to appeal to the Upper Tribunal on the grounds that the judge had failed to adequately resolve a material conflict as it was argued that it was not sufficiently clear how the appeal had been disposed and, on the second ground, that the judge had made a material misdirection of law in purporting to allow the appeal

outright when the only course open to the judge was to remit the matter back for a lawful decision to be reached by the Secretary of State for the Home Department.

8. Permission to appeal was granted by First-tier Tribunal Judge Parkes on the basis that it was arguable that the judge had no power to quash a decision of the Secretary of State, and in finding that discretion had not been exercised was not in a position to exercise it himself. Judge Parkes went on to state that the findings were clear but may well not be adequate.
9. The appeal then came before me. Ms Fijiwala for the respondent indicated that the parties had reached agreement that there was an error of law in the disposal of the case by Judge Munonyedi and that the case should be remitted to the Respondent to properly exercise her discretion.
10. Mr Jacobs for the Appellant asked that it be noted that there had been no challenge by the Respondent to the findings of fact of the First-tier Tribunal Judge and asked for directions that these findings be preserved. It was his view that the only possible outcome from a remittal to the Secretary of State would be a grant of indefinite leave to remain. That is a matter for the Secretary of State. Additionally although Mr Jacobs asked for directions that the Secretary of State remake her decision within 3 months, it is not for the Tribunal to fetter the Secretary of State in this manner.
11. There was no challenge before me to the findings of fact of Judge Munonyedi and these are preserved. I do find however that the judge erred in law in the disposal of the Appellant's appeal. The jurisprudence including the case of **Ukus [2012] UKUT 00307 (IAC)**, it is clear that when the decision maker has failed to exercise a discretion vested in him the jurisdiction of the Tribunal is limited to a decision that renders the decision not in accordance with the law. The appropriate course for the Tribunal is to require the decision maker to complete his task by reaching a lawful decision on the outstanding application.
12. In the circumstances, I set aside the decision of the First-tier Tribunal Judge which did involve an error on point of law. I remake the decision allowing the appeal to the extent that it is not in accordance with the law and remitting the case to the Secretary of State for the Home Department for her lawful decision to be reached, to allow the Secretary of State to exercise her discretion.
13. No anonymity direction was made at the First-tier and no anonymity direction ought or made now.

### **Notice of Decision**

14. The Secretary of State's appeal succeeds to the limited extent that the case is remitted to the Secretary of State to await her lawful decision.

Signed

Date: 19<sup>th</sup> August 2015

M. M. Hutchinson  
Deputy Judge of the Upper Tribunal

**TO THE RESPONDENT**  
**FEE AWARD**

As this is the Secretary of State's appeal there can be no fee award.

Signed

Date: 19<sup>th</sup> August 2015

M. M. Hutchinson  
Deputy Judge of the Upper Tribunal