



**The Upper Tribunal
(Immigration and Asylum Chamber) Appeal number: IA/29211/2014**

THE IMMIGRATION ACTS

**Heard at Manchester
On August 20, 2015**

**Decision & Reasons Promulgated
On September 8, 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

**MR SHEIKH SUMMER ABBAS
(NO ANONYMITY DIRECTION)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Appellant Ms Karnick, Counsel, instructed by Adamsons Law
Respondent Mr McVeety (Home Office Presenting Officer)

DECISION AND REASONS

1. The appellant is a national of Pakistan. The appellant entered the United Kingdom on May 14, 2007 as a visitor and on September 14, 2007 he submitted an application for leave to remain but that application was rejected on September 28, 2007. He made a further application of October 22, 2007 and this was granted on November 9, 2007 and he was given a short period of leave until February 9, 2008. An application to extend that leave was refused on March 5, 2008 and on July 16, 2009 and August 10, 2010 he was served with form IS151A as an overstayer.

2. On August 12, 2010 he requested a reconsideration of the March 5, 2008 decision but this was rejected and he thereafter submitted a judicial review application. By agreement that application was withdrawn and following reconsideration he was granted leave to remain as a visitor on November 8, 2010 until February 8, 2011.
3. His applications for leave to remain outside of the Rules on February 5, 2011 and January 28, 2013 were both refused on March 2011 and December 2013.
4. On April 8, 2014 he submitted an application outside the Rules under article 8 and this was refused on June 26, 2014 and directions were given to his removal under section 10 of the Immigration and Asylum act 1999.
5. On July 16, 2014 the appellant appealed under section 82 (1) of the Nationality, Immigration and Asylum Act 2002 (hereinafter referred to as the "2002 Act").
6. The matter came before Judge of the First-tier Tribunal Williams on October 13, 2014 and in a decision promulgated on November 28, 2014 the Tribunal upheld the refusal and dismissed the appellant's appeal.
7. The appellant applied for permission to appeal on December 11, 2014 submitting the Tribunal had erred. Permission to appeal was refused by Judge of the First-tier Tribunal Maller on January 26, 2015 but when those grounds were renewed to the Upper Tribunal Deputy Upper Tribunal Judge McGinty he granted permission finding it is arguable the Tribunal had erred in its approach to section EX.1 of Appendix FM and had thereafter approached its article 8 consideration incorrectly.
8. No Rule 24 response was filed by the respondent and when the matter came before me on the above date the parties were represented as set out above.
9. No anonymity direction is required.

PRELIMINARY ISSUES

10. Mr McVeety accepted the Tribunal had approached its assessment of section EX.1 incorrectly in light of the decision of R (on the application of Chen) v SSHD (Appendix FM-Chikwamba-temporary separation-proportionality) IJR [2015] UKUT 00189 (IAC). He accepted the Tribunal's approach to "temporary separation" was incorrect because at paragraph [10] of its determination the Tribunal proceeded on the basis that there are no insurmountable obstacles when parties are required to return to the appellant's country for a limited period only. Whilst initially approaching this matter on the basis that that decision may not be material Mr McVeety conceded, having heard Mr Karnick's submissions, that there was a material error both in the approach to Section EX.1 and section 117B of the 2002 Act because the decision under the Immigration Rules was flawed.

11. In light of this concession I raised with Mr Karnick whether he wanted this case retained in the Upper Tribunal but having taken instructions he requested that the Tribunal remit the matter back to the First-tier Tribunal for a hearing on the basis that the whole determination was flawed and the appellant was entitled to a full right of appeal.
12. I considered Part 3, Section 7.1 to 7.3 of the Practice Statement.
13. Part 3, Section 7.1 to 7.3 of the Practice Statement states:

“Where under section 12(1) of the Tribunals, Courts and Enforcement Act 2007 (proceedings on appeal to the Upper Tribunal) the Upper Tribunal finds that the making of the decision concerned involved the making of an error on a point of law, the Upper Tribunal may set aside the decision and, if it does so, must either remit the case to the First-tier Tribunal under section 12(2)(b)(i) or proceed (in accordance with relevant Practice Directions) to re-make the decision under section 12(2)(b)(ii).

The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:

- (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party’s case to be put to and considered by the First-tier Tribunal; or
- (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

Remaking rather than remitting will nevertheless constitute the normal approach to determining appeals where an error of law is found, even if some further fact finding is necessary.”

14. In light of the Practice Direction whilst I had some concerns in remitting this matter back to the first Tier Tribunal due to the inherent delays existing in the jurisdiction at the present time I reluctantly accepted those submissions.
15. It goes without saying that once that date has been fixed the appellant should serve on both the tribunal and the respondent and updated bundle of evidence that is to be relied on.

DECISION

16. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. I have set aside the decision.
17. The appeal is remitted back to the First-tier Tribunal for a fresh appeal hearing under Section 12 of the Tribunals, Courts and Enforcement Act 2007.

Signed:

Dated:

A handwritten signature in black ink, appearing to read 'SPAL' with a flourish underneath.

Deputy Upper Tribunal Judge Alis