



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

Appeal Number: IA/31819/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 2 June 2015**

**Determination Promulgated
On 8 June 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE J M LEWIS

Between

**KHAWAJA TARIQ MEHMOOD WANI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Nasim of Counsel instructed by Mayfair Solicitors
For the Respondent: Mr C Avery, Home Office Presenting Officer

DECISION AND REASONS

The History of the Appeal

1. The Appellant, a citizen of Pakistan, applied on 15 February 2012 for leave to remain in the UK. His application was refused on 19 June 2013. His ensuing appeal was heard on 24 February 2014 by Judge Gillespie, sitting at Hatton Cross. Both parties were represented, the Appellant by Mr Nasim. In a determination of 20 February, promulgated on 24 February, 2014, Judge Gillespie allowed the appeal to the extent of remitting it to the Respondent for further consideration pending the outcome of the

application by the Appellant's wife for indefinite leave to remain in the UK. Two days later, on 26 February 2014, this was granted to her. The Appellant's case was reconsidered and refused in a decision of 1 August 2014.

2. The Appellant's ensuing second appeal was heard on 27 January by Judge Kelly, again sitting at Hatton Cross. Again both parties were represented, the Appellant by Mr Nasim. In a decision of 30 January, promulgated on 4 February, 2015, the appeal was allowed to the limited extent that the decision was not in accordance with the law and was remitted to the Respondent for a lawful decision.
3. Permission to appeal was granted to the Respondent on 20 April 2015 by Judge Lambert in the following terms:
 - "1. The Respondent seeks permission to appeal, out of time, against a decision of the First-tier Tribunal (Judge Kelly) who, in a decision promulgated on allowed the Appellant's appeal against the Secretary of State decision to refuse leave to remain on Article 8 grounds.
 2. The Respondent puts forward delayed service of the decision and lack of resources as reasons for the late appeal and argues lack of prejudice to the Appellant given the judge's decision to remit for a lawful decision.
 3. The issue giving rise to the remittal was the fact that this was an application made before the introduction of Appendix FM, but had been decided by the Respondent under the new rules. The judge relied on **Edgehill**, recording that counsel for the Respondent had no submissions challenging its applicability.
 4. The grounds argue the Court of Appeal decision in **Singh** to mean the judge's approach to be unarguably wrong. Although it is not clear to me whether **Singh** had been promulgated at the date of the Judge's decision and it certainly was not mentioned or relied upon by Counsel for the Respondent at the hearing on 27 January, having regard to the latter decision there is an arguable error of law disclosed by the application."
4. Mr & Mrs Wani attended the error of law hearing, which took the form of submissions, which I have taken into account, together with the permission application. I reserved my determination.

Determination

5. Judge Kelly decided the appeal on the basis of the then legal authority of **Edgehill** [2014] EWCA Civ 402 and **Haleemudeen** [2014] EWCA Civ 558. In that light she held that, as the Appellant's application had been made on 15 February 2012, and so before 9 July 2012 when Appendix FM and Paragraph 276ADE of the Immigration Rules came into force, the Respondent had been wrong to determine the application by reference to those provisions.

6. Inexplicably, the power of prophecy deserted all of those present at the hearing. **Singh & Khalid v SSHD** [2015] EWCA Civ 74, subsequently promulgated, qualified the previous authorities by holding that the window of time during which claims based on private and family life made before 9 July 2012 were to be considered without reference to Appendix FM and paragraph 276ADE had opened on that date and closed on 6 September 2012. Both decisions made in relation to the Appellant, on 19 June 2013 and 1 August 2014, were made after that time. It followed that the Respondent had been correct in basing the decision upon those provisions.
7. For this reason, both representatives at the error of law hearing agreed that the decision of Judge Kelly was based upon a material, albeit legally retroactive and wholly unknowable, error of law and could not stand. I so find, and accordingly set the decision aside.
8. The decision must therefore be made again. The question which arose at the error of law hearing is by whom. For the Appellant, Mr Nasim invited me to remit it to the Respondent on the basis that the decision of the Respondent was not in accordance with the law. Alternatively, he asked me to remit it to the First-tier Tribunal for a substantive hearing on the basis that no findings of fact had been made. For the Respondent, Mr Avery asked me to remit it to the First-tier Tribunal.
9. In support of his submission, Mr Nasim submitted that the decision of the Respondent had not sufficiently considered the complex immigration history of the Appellant and his wife, including the first determination of Judge Gillespie. Nor, he said, had it sufficiently reflected the criteria for exceptional circumstances in Section 9.2 of the Immigration Directorate Instruction on Family Migration. I have concluded that, whilst this submission is arguable, it does not establish that the decision of the Respondent, which did give consideration to the immigration history of the Appellant and his wife and to exceptional circumstances, was so inadequate as to allow a conclusion that it was not in accordance with the law. These issues can and will be addressed by the Tribunal when it considers the appeal again on its merits.
10. Since no findings of fact have been made, I remit the appeal for hearing by the First-tier Tribunal, by any judge other than Judge Gillespie or Judge Kelly.

Notice of Decision

11. The original decision contained an error of law, albeit a retroactive one of which the judge could not have known. I accordingly set the decision aside.
12. The appeal is remitted to the First-tier Tribunal for a full hearing before any judge other than Judge M Gillespie or Judge A Kelly.
13. No anonymity direction is made.

Signed

Dated: 3 June 2015

Deputy Upper Tribunal Judge J M Lewis