Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number:
HU/11178/2019 (P)

THE IMMIGRATION ACTS

Decided under rule 34	**Decision & Reasons Promulgated**
On 20 January 2021	**On 3 February 2021**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

TORAN [A]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. This decision has been made on the papers, under Rule 34 of The Tribunal Procedure (Upper Tribunal) Rules 2008, further to my directions of 5 January 2021.

2. The appellant is a national of Pakistan born on 2 May 1998. He arrived in the United Kingdom on 2 May 2007 with his family, aged nine years. The family entered on a six month visit visa and the appellant's father claimed asylum on 14 June 2007 with the rest of the family as dependents on his claim. The asylum claim was refused and a removal decision was made on 15 January

2010. An appeal against that decision was dismissed in the First-tier Tribunal and the family became appeal rights exhausted on 17 September 2010. The appellant's father made various further submissions as well as an Article 8 claim, all of which were refused.

3. On 2 April 2015 the appellant made an application for leave to remain on family and private life grounds, in his own right, which was refused on 22 June 2015. He appealed against that decision and his appeal was allowed by First-tier Tribunal Judge Porter on 24 November 2016, following a hearing on 20 September 2016. The respondent was not represented at that hearing. The judge made his decision without knowledge of the fact that the appellant had been convicted on 22 November 2016 for possession with intent to supply Class A and B drugs, namely heroin, crack cocaine and cannabis. The appellant was sentenced, on 25 November 2016, to 39 months in a young offender institution on two counts, and one month on the third count, all to run concurrently.

4. On 10 December 2016 the appellant was served with a Notice of Decision to Deport, notifying him that section 32(5) of the UK Borders Act 2007 applied and inviting representations. The appellant's representatives made representations in response, on 4 January 2017, on Article 8 grounds.

5. In light of the previous allowed appeal, the appellant was granted leave to remain until 30 April 2021 on private life grounds under paragraph 276ADE(1). His parents and brothers were granted leave separately until 14 February 2021.

6. However, on 18 June 2019 the respondent made a decision to refuse the appellant's human rights claim of 4 January 2017, following the signing of a Deportation Order on 11 June 2019. In the decision of 18 June 2019, the respondent noted that the family life exception to deportation did not apply, as no family life was claimed in the UK, and considered that the appellant did not meet the private life exception in paragraph 399A as he had not been lawfully resident in the UK for most of his life and it was not accepted that he was socially and culturally integrated in the UK or that there were very significant obstacles to his integration in Pakistan. The respondent did not accept that there were very compelling circumstances outweighing the public interest in deportation.

7. The appellant's appeal against that decision was heard by First-tier Tribunal Judge Khan on 24 October 2019 and was allowed in a decision promulgated on 21 November 2019.

8. Following the grant of permission to the respondent to appeal to the Upper Tribunal, the matter was listed for an error of law hearing on 24 March 2020. However, in light of the need to take precautions against the spread of Covid-19, the hearing was vacated and, in the absence of any objection by the appellant's representatives, the error of law issue was determined without a hearing, under rule 34, as follows:

"12. Written submissions have been received from Mr T Melvin on behalf of the Secretary of State, from which it is evident that there is no objection to a decision being made on the error of law matter without a hearing. There has been no response from the appellant. I note that the appellant's representatives emailed the Upper Tribunal on 16 March 2020 advising that they were unable to take matters forward as they did not have their client's instructions. That was addressed by the President in his Note and Directions sent out on 8 April 2020, whereby he stated at [7] that the representatives, Marks & Marks Solicitors, had not come off the record and were therefore properly served with the directions, and that they were able to leave a voicemail for the appellant to seek instructions with regard to the directions. Nothing further has been received from those solicitors and there is no indication that they have come off the record. In the circumstances, and given the direction given by the President at [3], I see no reason why I cannot proceed to determine this matter under rule 34. I do not consider that any issues of unfairness arise from my doing so, given the clear indication in the directions. Furthermore, the errors made by the judge are clear and I do not consider that the appellant would be able to defend the decision even if he were to make submissions.

13. As the respondent's submissions properly identify, the judge did not have regard to the correct version of the immigration rules, in particular paragraph 399A (see [9] and [43]) and he failed to make any clear or proper findings on the exceptions to deportation under the immigration rules and section 117C of the 2002 Act. Having found at [38] that the appellant had only had lawful residence in the UK from 24 November 2016, he could not have found that the requirements of paragraph 399A were met. As such, he was required to consider whether there were any very compelling circumstances over and above the family and private life exceptions in paragraph 399 and 399A, which he plainly failed to do. Instead, the judge simply considered whether the appellant's deportation was disproportionate, and in so doing he applied incorrect criteria. He gave particular weight to the findings of First-tier Tribunal Judge Porter in his previous decision of 24 November 2016 allowing the appellant's appeal on Article 8 grounds, having no regard to the fact that that appeal had been allowed solely under paragraph 276ADE(1)(iv) of the immigration rules, without any knowledge of the appellant's criminal offending and convictions and in circumstances where deportation was not an issue.

14. In the circumstances, the judge's decision is materially flawed, being based upon an incorrect consideration of the relevant immigration rules, the application of incorrect and irrelevant criteria and without any identification of very compelling circumstances outweighing the public interest in deportation. Accordingly, I set aside Judge Khan's decision.

15. However, I do not agree with Mr Melvin that it would be appropriate to remit the matter to the First-tier Tribunal. The basic factual circumstances, as found by the Judge, are not challenged. The challenge is to the judge's application of the relevant immigration rules and criteria to those factual circumstances. Accordingly, the appropriate course is for the matter to be retained in the Upper Tribunal for the decision to be re-made. The matter will therefore be listed for a resumed hearing on that basis.

9. The case was then listed for a face-to-face hearing on 6 January 2021. However, following further directions sent to the parties and further developments in the case, the hearing was adjourned with the following directions made:

"NOTICE AND DIRECTIONS

> 1. This case is listed for a resumed, face-to-face hearing tomorrow, 6 January 2020. However, further to the appellant's solicitor's email of today's date with the suggestion of an adjournment to a different date for a remote hearing, and given the current changed circumstances relating to coronavirus, I consider it appropriate to adjourn the hearing.
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> 2. In light of the request previously made by the respondent, as referred to at [15] of my decision dated 19 May 2020, and given the delay that has occurred owing to coronavirus, the further developments in this case and the need for further oral evidence and findings of fact, it seems to me that it would now be appropriate for the matter to be remitted to the First-tier Tribunal to be heard afresh before a different judge.
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> 3. It is therefore proposed that a short decision will be made disposing of the matter in the Upper Tribunal and remitting the case to the First-tier Tribunal for a *de novo* hearing. Any objection to this proposal is to be made in writing to the Upper Tribunal, copied to the other party, no later than 5pm on Wednesday 13 January 2021. In the absence of any reasonable objection or any response to the proposal, a decision will be made in such terms."

10. There has been no response and no objection to the proposal in the directions from either party and, as such, having set aside Judge Khan's decision, I remit the case to the First-tier Tribunal to be heard *de novo*, with no findings preserved.

DECISION

11. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside. The appeal is remitted to the First-tier Tribunal to be dealt with afresh, pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(a), before any judge aside from Judge Khan.

Signed: S. Kebede
Upper Tribunal Judge Kebede Dated: 20 January 2021