IAC-AH-DP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/23294/2014

THE IMMIGRATION ACTS

Heard at Centre City Tower Birmingham
On 7th December 2015

Decision & Reasons Promulgated
On 21st December 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

VALENTINE GORDON
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr D Mills, Senior Home Office Presenting Officer
For the Respondent: Ms G Vencatachellum of Counsel instructed by Capehill Solicitors

DECISION AND REASONS

1. The Secretary of State appeals against a decision of Judge Phull of the First-tier Tribunal (the FtT) promulgated on 1st May 2015.

2. The Respondent before the Upper Tribunal was the Appellant before the FtT and I will refer to him as the Claimant.

3. The Claimant is a Jamaican citizen born 28th May 1977. He applied for leave to remain in the UK based upon the family and private life he had established since his arrival as a visitor on 5th October 2000.

4. The application was refused on 12th May 2014 and on that date a decision was made to remove the Appellant from the UK, following refusal of his human rights claim.

5. The appeal was heard by the FtT on 17th March 2015. The FtT found that the Respondent's decision was not in accordance with the law, because the Claimant had made his application for leave to remain before the Immigration Rule changes on 9th July 2012. The FtT found that the Respondent was wrong to consider the application with reference to Appendix FM in relation to private life, and paragraph 276ADE(1) in relation to private life, as those provisions had only been introduced into the Immigration Rules on 9th July 2012.

6. Because the Respondent had failed to consider the Claimant's application with reference to the Immigration Rules in force prior to 9th July 2012, the FtT allowed the appeal on the basis that the Respondent's decision was not in accordance with the law, and therefore the matter remained outstanding before the Secretary of State for a lawful decision.

7. This prompted the Secretary of State to apply for permission to appeal to the Upper Tribunal. In summary it was submitted that the FtT had erred by failing to consider Singh and Khalid [2015] EWCA Civ 74 and in particular paragraph 56. It was submitted that the Secretary of State was entitled to apply the Immigration Rules introduced on 9th July 2012, unless a decision was taken between 9th July 2012 and 6th September 2012. It was submitted that in this case the Secretary of State's decision was dated 12th May 2014, therefore the FtT was wrong to find the decision not in accordance with the law.

8. Permission to appeal was granted and directions were issued that there should be a hearing before the Upper Tribunal to ascertain whether the FtT had erred in law such that the decision should be set aside.

Oral Submissions

9. Mr Mills relied upon the grounds contained within the application for permission to appeal and submitted that in the light of Singh and Khalid, the decision of the FtT was clearly wrong in law and could not stand and it would be appropriate to set aside the decision and remit the appeal to be heard again before the FtT.

10. Ms Vencatachellum accepted that the FtT had not taken into account he principles set out in Singh and Khalid.

My Conclusions and Reasons

11. The FtT erred in law and the decision is set aside. The Secretary of State was entitled to take into account Appendix FM and paragraph 276ADE(1) which had been introduced into the Immigration Rules on 9th July 2012, and the FtT was wrong to conclude to the contrary.

12. The FtT erred in not considering Singh and Khalid, and I set out below paragraph 56 of that decision, which explains why the FtT erred in law;

> "56. The foregoing analysis has regrettably been somewhat dense, but I can summarise my conclusion, and the reasons for it, as follows:
>
> (1) When HC 194 first came into force on 9th July 2012, the Secretary of State was not entitled to take into account the provisions of the new Rules (either directly or by treating them as a statement of her current policy) when making decisions on private or family life applications made prior to that date but not yet decided. This is because, as decided in **Edgehill**, "the implementation provision" set out at para. 7 above displaces the usual **Odelola** principle.
>
> (2) But that position was altered by HC 565 – specifically by the introduction of the new paragraph A277C – with effect from 6th September 2012. As from that date the Secretary of State was entitled to take into account the provisions of Appendix FM and paragraphs 276ADE – 276DH in deciding private or family life applications even if they were made prior to 9th July 2012. The result is that the law as it was held to be in **Edgehill** only obtained as regards decisions taken in the two month window between 9th July and 6th September 2012.
>
> (3) Neither of the decisions with which we are concerned in this case fell within that window. Accordingly the Secretary of State was entitled to apply the new Rules in reaching those decisions."

13. The decision in this appeal was made on 12th May 2014, and therefore the Secretary of State was entitled to apply the new rules.

14. When I announced that the decision of the FtT was set aside, Ms Vencatachellum did not oppose Mr Mills' suggestion that it was appropriate to remit to the FtT.

15. In consideration that issue I have taken into account paragraph 7 of the Senior President's Practice Statements dated 25th September 2012 which provides as follows;

> '7.1 Where under Section 12(1) of the 2007 Act (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).

7.2 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 and 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.

7.3 Re-making 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.'

16. In my view the requirements of paragraph 7.2 are met. This appeal has not been substantively considered by the FtT and judicial fact-finding is necessary, which should be carried out by the FtT, rather than the Upper Tribunal.

17. Therefore, with the consent of both parties, the appeal is remitted to the FtT, to be heard by a Judge other than Judge Phull. The appeal will be heard at the hearing centre at Sheldon Court Birmingham and the parties will be advised in writing of the time and date of the hearing. The Tribunal has been advised that an interpreter will not be required. If that is not the case, the Tribunal must be notified immediately.

Notice of Decision

The decision of the First-tier Tribunal involved the making of a material error of law such that it is set aside with no findings preserved. The appeal is allowed to the extent that it is remitted to the First-tier Tribunal.

Anonymity

No order for anonymity was made by the First-tier Tribunal and there has been no request for anonymity made to the Upper Tribunal. There is no anonymity order.

Signed Date: 9th December 2015

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

The Upper Tribunal makes no fee award. This must be decided by the First-tier Tribunal.

Signed Date: 9th December 2015

Deputy Upper Tribunal Judge M A Hall