Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/24027/2014**

THE IMMIGRATION ACTS

Heard at Glasgow
On 25th June 2015

Decision Promulgated
17th July 2015

Before

MR C M G OCKELTON, VICE PRESIDENT
DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

PARVEZ IQBAL

Respondent

Representation:
For the Appellant: Mr S Duffy, Senior Home Office presenting Officer.
For the Respondent: Mr M Moksud, of First Global Immigration.

DECISION AND REASONS

1. The Secretary of State for the Home Department brings this appeal to the Upper Tribunal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal.

2. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Bradshaw, promulgated on 19 August 2014, which allowed the appellant's appeal to the extent that the case was remitted to the respondent to consider the appellant's case on the basis of the law prior to the amendment to the Immigration Rules which came into force on 9 July 2012.

Background

3. The appellant was born on 4 May 1958. He is a citizen of Pakistan. He entered the UK on 14 February 2007 with entry clearance as a work permit holder. That entry clearance was valid until 19 December 2010. On 16 May 2008, the appellant's wife and two children (the oldest of whom has now attained majority) entered the UK as the appellant's dependents. The appellant, his wife and his children have remained in the UK even though their leave to do so expired on 19 December 2010.

4. On 22 June 2011, the appellant sought leave to remain in the UK under Article 8 ECHR. That application was refused by the respondent on 23 August 2011. On 7 May 2014, the appellant submitted a further claim to the respondent, seeking leave to remain in terms of Articles 3 and 8 ECHR. On 20 May 2014, the respondent refused the appellant's application. On 24 May 2014, the respondent served a decision to remove the appellant, together with separate decisions to remove the appellant's wife and one of the appellant's sons. Only the appellant appealed against the respondent's decision to remove.

The Judge's Decision

5. The appellant appealed to the First Tier Tribunal. First Tier Tribunal Judge Bradshaw ("the Judge") allowed the appellant's appeal but only to the extent that he directed the respondent to consider the application made by the appellant on the basis of the law prior to the amendment to the Immigration Rules, introducing Appendix FM to the Rules from 9 July 2002. The Judge placed reliance on the case of Edgehill [2014] EWCA Civ 402.

6. The respondent sought permission to appeal to the Upper Tribunal and on 7 October 2014, First Tier Tribunal Judge Nicolson gave permission to appeal, noting *inter alia*:

> "5. First in this case the appellant could not show that he met the requirements of the old rules. His case was synonymous with that of the appellant HB in Edgehill, whose appeal was dismissed.
>
> 6. Secondly, there is a tension between Edgehill and Haleemudeen.
>
> 7. Thirdly, in this case the appellant appears to have had no right of appeal against the decision to refuse him leave. On the judge's summary of facts, that was not an immigration decision for the purpose of Section 82(2)(d) of the 2002 Act because the appellant appears to have been an overstayer before the application was submitted. If that was the position, his appeal only lay against removal to Pakistan.
>
> 8. Whilst the transitional provisions identified by the Court of Appeal in Edgehill stated that applications for entry or leave prior to 9 July 2012 should be considered on the basis of the old rules, they did not specifically restrict the respondent's approach to a decision to remove. That was not a point specifically considered in Edgehill…"

The Hearing

7. Mr Duffy for the respondent relied on Singh v SSHD [2015] EWCA Civ 74 in which it was held that the Secretary of State was entitled to apply Appendix FM

to decisions following the statement of changes from 6 September 2012, regardless of when that decision was made, but that decisions made between 9 July and 5 September, both 2012, fall to be decided under the "*old rules*".

8. Mr Moksud, for the appellant, submitted that we should ignore Singh v SSHD [2015] because the judge found that the appellant's application was originally submitted on 20 September 2011. Mr Moksud complained that it took the respondent two years and eight months to reach a decision.

Analysis

9. HC 194, which introduced Appendix FM to the Immigration Rules came into force on 9 July 2012. It contained an "*implementation provision*" which stated "*if an application for entry clearance, leave to remain or indefinite leave to remain has been made before 9 July 2012 and the application has not been decided it will be decided in accordance with the rules in force on 8 July 2012*". A further statement of changes, HC 595, came into force on 6 September 2012. HC 595 contained Paragraph A277C which provided "*subject to paragraphs A277 to A280 and Paragraph GEN1.9 of Appendix FM of these rules, where the Secretary of State is considering any application to which the provisions of Appendix FM (Family life) and Paragraphs 276ADE to 276DH (Private life) of these rules do not already apply, shall also do so in line with those provisions*". In Singh v SSHD, Underhill LJ found that Paragraph A277C in HC 595 was intended to reverse the effect of the implementation provision.

10. We were addressed by both representatives on whether or not the appellant could fulfil the requirements of either Appendix FM or Paragraph 276ADE. It is not disputed that the appellant is an overstayer. He has not had leave to remain in the UK since 19 December 2010. His Article 8 application was refused by the respondent. There is no right of appeal against that refusal. The right of appeal is against the decision to remove the appellant. The appellant enjoys an in-country right of appeal against the decision to remove because he has previously intimated a claim in terms of Article 8 ECHR (s.92(4) of the 2002 Act). Removal decisions have been taken against the appellant, his wife and at least one of his sons. Only one of his sons is still in minority. None of the remainder of the appellant's family has appealed against removal decisions, so they are awaiting removal to Pakistan.

11. We are told that the appellant is not working and we can see from the documents before us that he relies on his brother (in Manchester) for support. At the date of application, none of the appellant's children have lived in the UK for seven years. Because of the length of time the appellant has been in the UK, he cannot fulfil the requirements of Paragraph 276ADE of the Immigration Rules. The appellant and his family are subject to immigration control and so cannot satisfy either EX1.1 or R-LTRP1.1(d) of Appendix FM of the Immigration Rules. Having listened to the appellant's agent's submissions, we are unable to identify anything to suggest that it would be unreasonable for the appellant to return to Pakistan.

12. Notwithstanding what is said by the appellant's agent, Singh v SSHD applies. The *ratio* of Singh v SSHD did not change the law, it clarified the law as the law existed at the date of decision.

13. The appellant cannot satisfy the Immigration Rules. In SS (Congo) and Others [2015] EWCA Civ 387 Richards LJ said at paragraph 33 "*In our judgment, even though a test of exceptionality does not apply in every case falling within the scope of Appendix FM, it is accurate to say that the general position outside the sorts of special contexts referred to above is that compelling circumstances would need to be identified to support a claim for grant of LTR outside the new Rules in Appendix FM*."

14. We consider whether or not there is anything exceptional (or compelling) in this case. This is an appeal by one member of a family of four. At least two other family members have been served with removal directions. None of the other family members have appealed against those removal directions. The appellant and his family have overstayed leave to remain in the UK since December 2010. There is nothing exceptional in this case which would merit consideration outwith the Immigration Rules.

Conclusion

15. We therefore find that the Judge's decision is tainted by a material error of law. We remake the decision. **We set aside the decision of the First-tier Tribunal as containing a material error of law. We substitute the following decision.**

Decision

16. The appeal is dismissed.

Signed Date

Deputy Upper Tribunal Judge Doyle