Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/46898/2014
IA/46922/2014
IA/46925/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 August 2015	**On 7 September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

BHARTI SHARMA
GRACY SHARMA
AJAY KUMAR
(ANONYMITY ORDER NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellants: Ms Mehtab Malhotra, Counsel instructed by Shri Venkateshwara
For the Respondent: Ms J. Isherwod, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The First Appellant is a national of India born on 21 September 1985. The third appellant is her husband, an Indian national born on 12 January 1984. The second appellant is their daughter born on 24 May 2011.

2. The First appellant entered the UK with entry clearance as a Tier 4 (General) Student in September 2009. She applied for, and was granted, leave to remain as a Tier 1 (Post Study) migrant on 4 August 2012 expiring on 25 September 2014.

3. On 19 September 2014 she applied for leave to remain as a Tier 4 (general) student. This was refused on the basis that paragraph 245ZX(o) of the Immigration Rules was not satisfied, the Secretary of State not being satisfied that she was a genuine student.

4. On 18 November 2014 the appellants lodged an appeal on Form IAFT-1. They ticked the box to say that they wanted the appeal to be decided on the papers and paid the corresponding fee. On the form they stated that grounds will follow. They were sent a notice giving them until 11 February 2015 to make further submissions. The First appellant duly sent these in the form of a letter by registered post. The letter is dated 28 January 2015 and was received on 9 February 2015.

5. The appeal was considered by Judge O'Hagan on 12 February 2015 without a hearing. The judge did not find the letter of 28 January 2015, setting out the appellant's grounds, on the file and therefore did not take the arguments and submissions made in this letter into consideration.

6. In reaching his decision the judge noted that the appellants had not "put forward any case to set against the Secretary of State's case," and found the respondent's evidence to be unchallenged, the appellants not having "advanced any argument, or presented any evidence, to stand against the respondent's case".

7. The appellants appealed on the basis that they had submitted grounds but the judge had not considered them.

8. At the hearing Ms Isherwood, for the respondent, acknowledged that the judge had not had sight of the appellants' submissions/grounds despite these having been submitted within time, but argued that this was not material as the appellants' submissions did not properly address the relevant issues and they could not, in any event, have succeeded in the appeal.

9. Ms Malhotra argued that the judge may have taken a different approach had he had the benefit of seeing the appellants' submissions and arguments and that his approach to the evidence was affected by the mistaken belief that the appellants had not submitted any evidence or arguments to support their appeal.

10. I informed the parties that I agreed the points made by Ms Malhotra. The appellants have not had an opportunity to have their submissions and arguments considered. The failure of the judge to review and consider the appellants' grounds, although almost certainly through no fault of his own, amounts to a serious procedural unfairness.

11. In considering whether I should remake the decision or remit it to the First-tier Tribunal, I keep in mind the comments made in *MM (unfairness; E & R) Sudan* [2014] UKUT 105 (IAC)

> "By section 12 of the 2007 Act, where the Upper Tribunal concludes that the decision of the First-Tier Tribunal involved the making of an error on a point of law **and** decides to set the decision aside, it must either remit the case to the First-tier Tribunal or remake the decision itself. We consider that, as a fairly strong general rule, where a first instance decision is set aside on the basis of an error of law involving the deprivation of the Appellant's right to a fair hearing, the appropriate course will be to remit to a newly constituted First-Tier Tribunal for a fresh hearing. This is so because the common law right to a fair hearing is generally considered to rank as a right of constitutional importance and it is preferable that the litigant's statutory right of appeal to the Upper Tribunal should be triggered only where the former right has been fully enjoyed."

12. Accordingly, I have decided to remit the appeal to a differently constituted First-tier Tribunal to be determined afresh.

13. Ms Malhotra submitted that the appellants' preference would now be for the appeal to be heard orally. However, as is clear from the application form, the appellants applied for the appeal to be dealt with on the papers only. I am not satisfied that there is any reason why the appeal should now be heard on a different basis to that which the appellants originally applied (and paid the fee) for.

DECISION

14. The decision of the First-tier Tribunal involved the making of a material error of law and is set aside in its entirety.

15. The appeal is remitted to the First-tier Tribunal for hearing afresh on the papers and without an oral hearing by a judge other than Judge O'Hagan.

16. I have not been asked, and see no reason, to make an anonymity order.

Signed Dated

Deputy Upper Tribunal Judge Sheridan