Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/25804/2014
& IA/25805/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 8 April 2015	**On 13 April 2015**

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

Devraj Oli
Gyanu Prasai Oli
[No anonymity direction made]

Claimants

Representation:
For the claimants: Mr M Puar, instructed by NC Brothers & Co Solicitors
For the appellant: Mr T Wilding, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appeal of the Secretary of State against the decision of First-tier Tribunal Judge Pacey promulgated 29.10.14, allowing the claimants' appeals against the decisions of the Secretary of State, dated 10.6.14, to refuse their applications for leave to remain in the UK outside the Rules. The Judge heard the appeal on 24.10.14.

2. First-tier Tribunal Judge McDade granted permission to appeal on 9.12.14.

3. Thus the matter came before me on 8.4.15 as an appeal in the Upper Tribunal.

Error of Law

4. For the reasons set out below, I find that there was such error of law in the making of the decision of the First-tier Tribunal that the determination of Judge Pacey should be set aside.

5. In granting permission to appeal, Judge McDade found the decision of the First-tier Tribunal contained an arguable error of law.

6. In her short decision comprising just 6 paragraphs, Judge Pacey acceded to the submission of the claimants' representative to remit the decision to the Secretary of State on the basis that they had resided in the UK for a period of over 10 years, which had not been considered by the Secretary of State. The decision of the judge was that "the appeals are allowed to extent that they are remitted to the Secretary of State."

7. The grounds of appeal correctly submit that the First-tier Tribunal Judge acted beyond the jurisdiction of the First-tier Tribunal; there is no power in the First-tier Tribunal to remit a case to the Secretary of State, especially on the basis of an application that was never made. Pursuant to section 86 of the 2002 Act, the judge either had to dismiss the appeals, allow them outright, or allow them to the limited extend that the decisions were not in accordance with the law. None of these alternative decisions were made.

8. The claimants applied on 28.3.14 for leave to remain outside the Rules. The refusal decision of 10.6.14 did not have to anticipate that by September of 2014 the claimants might by then have resided in the UK for a period of 10 years, particularly since there are other requirements to paragraph 276B of the Immigration Rules, such as Life in the UK and English language requirements. In fact, since the second claimant has only been in the UK since 2008, she could not possible have met the 10 year requirement, even in September 2014. There was thus no failure on the part of the Secretary of State, who has to decide the application on the basis of the circumstances appertaining at the date of decision. The decisions of the Secretary of State were entirely in accordance with the law.

9. Further, if the claimants wished a particular application under the Rules to be considered, it was incumbent on them to make that application to the Secretary of State. The application made was for leave to remain outside of the Immigration Rules. It is arguable that an application for leave to remain under 276B must be made on the proper specified form and the appropriate fee paid and thus the question arises whether there was a valid application under 276B which could have been considered by the First-tier Tribunal. However, a section 120 notice was served and thus the claimants were entitled and indeed obliged to raise all grounds on which they relied, which Mr Wilding accepts that they did. In the circumstances

there is no mileage in that issue at this stage.

10. In the circumstances, the First-tier Tribunal should have considered whether either claimant met the requirements of 276B at the date of hearing. For the reasons stated above, the second claimant could not. In default, the First-tier Tribunal Judge should have considered private and family life under the Immigration Rules, Appendix FM and paragraph 276ADE, before considering whether there were such compelling circumstances insufficiently recognised in the Rules so as to render the decision unjustifiably harsh or otherwise, following the Razgar steps, disproportionate. None of that was done and thus the decision of the First-tier Tribunal must be set aside.

11. In passing I note Mr Wilding's argument that 276B(ii) requires the exercise of discretion by the Secretary of State and that it was not for the Tribunal to exercise such a discretion when there had been no consideration of that discretion by the Secretary of State. That is a matter that will have to wait for further discussion on the remaking of the decision in the appeal.

12. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. There has been no valid determination of the issues in the appeals.

13. In all the circumstances, I remit the appeal to the First-tier Tribunal on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The effect of the error has been to deprive the parties of a decision on the issues in the appeal. Having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

Conclusions:

14. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I remit the decision in the appeal to be remade afresh.

Signed
Deputy Upper Tribunal Judge Pickup

Dated 8 April 2015

Consequential Directions

15. The decision in the appeal is remitted to the First-tier Tribunal at Birmingham;

16. The estimated length of hearing is 2.5 hours;

17. No findings of fact were made and the appeal should be reheard in its entirety;

18. Either party has leave to adduce further evidence, such evidence to be lodged with the Tribunal and served on the other party no later than 7 days before the First-tier Tribunal hearing;

19. Skeleton arguments are to be served by both parties as to the issues in the appeal as highlighted above, such to be lodged with the Tribunal and served on the other party no later than 7 days before the First-tier Tribunal hearing.

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award Note: this is not part of the determination.

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The outcome of the appeal remains to be decided.

Signed

Deputy Upper Tribunal Judge Pickup

Dated 8 April 2015