Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/27435/2015
IA/27437/2015
IA/27439/2015
IA/27440/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7th September 2017	**On 4th October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS RUSHNA BEGUM
MR RAHAT AHMED
MR RUHIN AHMED
MASTER RIFAT AHMED
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:

For the Appellant: Mr P Duffy, Home Office Presenting Officer
For the Respondents: Mr M Gill QC instructed by Edward Alam & Associates

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State I refer to the parties as they were in the First-tier Tribunal.

2. The Appellants, nationals of Bangladesh, appealed to the First-tier Tribunal against a decision of the Secretary of State of 10th July 2015 refusing their applications for leave to remain in the UK on the basis of their private and family life. In a decision promulgated on 23rd December 2016, First-tier Tribunal Judge C Greasley allowed the appeals and the Secretary of State now appeals to this Tribunal with permission granted by First-tier Tribunal Judge Lambert on 10th July 2017.

3. The issue is whether the First-tier Tribunal Judge made an error of law in deciding that the decisions of the Secretary of State were not in accordance with the law because the applications were made in February 2008 but considered in July 2015 under the post July 2012 Immigration Rules. The judge's decision to return the cases to the Secretary of State was made on the basis that the July 2012 Immigration Rules did not apply to applications made before those Rules came into force and was based in part on a concession to that effect on the part of the Presenting Officer.

4. It appears from the history set out in the First-tier Tribunal Judge's decision that the first Appellant first entered the UK in April 2007 with entry clearance as a visitor along with her children. Her application for indefinite leave to remain was refused on 15th October 2007 and the Appellant applied again for leave to remain and that application was refused on 26th March 2008 with no right of appeal. As a result of an application for judicial review the Secretary of State undertook to reconsider the Appellant's case within a period of three months. That reconsideration resulted in the decision to refuse the application dated 10th July 2015.

5. The First-tier Tribunal Judge's decision records at paragraph 12 that, prior to hearing evidence, the Presenting Officer was asked to indicate the date on which the applications were made and he advised that all four Appellants made their application on 29th February 2008. The Appellants' representative submitted that all four refusal decisions were not in accordance with the law because the Respondent had applied the provisions of Appendix FM applicable at the date of the decision, however those provisions had not come into effect until July 2012 therefore the decisions were not in accordance with the law. It appears from paragraph 12 of the decision that the Presenting Officer and the Appellants' representative were in agreement with this approach. Although the judge went on to hear oral evidence this was not pertinent to the decision. The judge concluded at paragraph 27;

> "In light of the fact that [the Presenting Officer] indicated that the date of application of all four appellants was 29 February 2008, [the appellant's representative] submitted that all four refusal decisions were not in accordance with immigration law. The wrong law had been applied. [The Presenting Officer] did not seek to argue to the contrary. I indicated to all of the appellants, with the agreement of the representatives, that the respondent had, in effect, wrongly applied the provisions of Appendix FM to the United Kingdom immigration Rules which did not come into existence until July 2012. All four decisions of the respondent were made in 2015"

The Grounds of appeal and submissions

6. In her Grounds of Appeal to the Upper Tribunal the Secretary of State contends that the First-tier Tribunal Judge made an error of law because of the changes in the Immigration Rules and the decision in **Singh [2015] EWCA Civ 74** which overturned the case of **Edgehill & Anor v SSHD [2014] EWCA Civ 402 v SSHD**. Reliance is placed on paragraph 56 of the decision in **Singh** which states as follows;

> "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 9 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. That 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 6 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 9 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 9 July and 6 September 2012."

7. That decision highlights the fact that the position was altered by HC 565 which introduced the new paragraph A277C with effect from 6th September 2012 and as from that date the Secretary of State was entitled to take into account the provisions of Appendix FM and paragraphs 276ADE in deciding private or family life applications even if they were made prior to 9th July 2012.

8. Permission to appeal was granted by First-tier Tribunal Judge Lambert on the basis that the grounds draw attention to the judge's failure to take into account the decision of the Court of Appeal in the decision in **Singh**.

9. In advance of the hearing Mr Gill submitted outlined submissions. The thrust of those submissions are that the Secretary of State's representative made a specific concession at the hearing in the First-tier Tribunal. He submitted that the Secretary of State was entitled to take that position, that she is entitled to apply Rules which are more favourable to a claimant than the ones that should strictly speaking be applied. It is submitted that the Secretary of State is entitled to apply a more favourable policy or practice that may exist outside of the Rules under which the claimant's application would otherwise be able to be considered. It is submitted that the Appellants are entitled in law to hold the Secretary of State to that position. Given that the parties agreed the basis on which the appeal would be determined, in Mr Gill's submission, the judge was entitled to determine the appeal on that basis. It is submitted that the judge was entitled rely on the concession made at the hearing on behalf of the

Respondent that the Secretary of State had failed to act in accordance with the Rules which should have been applied in this case. It is submitted that there is a binding judicial decision made by the First-tier Tribunal and the principles of finality of litigation must be respected (see paragraph 32 of **TB (Jamaica) [2008] EWCA Civ 977**). In any event it is submitted that the Secretary of State must submit an application to the Upper Tribunal to withdraw a concession and that any such application should be refused.

10. In his submissions Mr Gill relied on the decision in **IBM UK Holdings Ltd v Dalgleish [2017] CA Civ 1212** paragraphs 448 to 453 to support the argument that the Tribunal may exercise its discretion exceptionally to allow a new point of pure law to be taken provided certain conditions are met. It is submitted that here, the Secretary of State would be seeking permission to take a point which was considered and expressly conceded previously. If the Secretary of State is allowed to take this point it is submitted that further findings of fact will have to be made to dispose of the appeal and this will add to the Appellants' expense and inevitably cause them prejudice and probable further delay.

11. Mr Gill submitted that the Upper Tribunal should adopt an approach similar to that taken by the Court of Appeal in **AK (Sierra Leone) v SSHD [2016] EWCA Civ 999** where the Court of Appeal held that the Upper Tribunal had erred in allowing the Secretary of State to withdraw a concession made before a First-tier Tribunal that a foreign criminal's deportation was not in the public interest because he satisfied the exception under the Nationality, Immigration and Asylum Act 2002 Section 117C(4). In the view of the Court of Appeal that concession had in substance effectively conceded the appeal. It is submitted that an application to withdraw the concession in the present case by a party that is a public authority and regularly appears in the Tribunals in all appeals would encourage bad practice. It is contended that the Secretary of State cannot be permitted in such a case to be so cavalier with the Procedural Rules and to so dramatically undermine their overriding objective by making a clear and express concession and then seeking on appeal to abandon the previously conceded position.

12. At the hearing before me Mr Duffy relied on the Grounds of Appeal. He submitted that the First-tier Tribunal Judge was wrong in law in remitting the appeal to the Secretary of State because the Appellants in this appeal did not come within the so called '**Edgehill** window' of 9th July to 6th September 2012. In the absence of evidence to the contrary he accepted that a concession had been made in the First-tier Tribunal. However he submitted that a concession that is wrong in law is not a concession and that the judge was wrong to accept such a concession. He contended that, in submitting Grounds of Appeal, the Secretary of State effectively withdrew the concession and therefore there was no prejudice to the Appellants.

13. Mr Gill submitted that paragraph 27 of the decision records that the Home Office Presenting Officer did not seek to argue against the approach to be taken by the judge. He said that the Presenting Officer had conceded that the decision in this case

should have been made under the previous Rules. In his submission, the basis of that concession may have involved some mistake but the Rules are not law. He contended that the Secretary of State was saying in this case that she should have decided this case under a different set of Rules and that is not a concession of law but a concession that a more favourable set of Rules should apply. In his submission the Secretary of State was entitled to take this approach and the Appellants are entitled to hold her to that position. There is a legitimate expectation created that the Secretary of State will maintain her position. He accepted there may have been confusion in the minds of the representatives but submitted that that does not matter. This is not a pure concession of law in his submission because a pure concession of law not involving any interaction with the facts would lead to no prejudice. However in this case remaking requires further findings of fact if the case is remitted to the First-tier Tribunal and this would lead to more expense and delay in the circumstances of this case.

14. Mr Gill reiterated that there has been no application to withdraw the concession and submitted that the Grounds of Appeal to the Tribunal do not amount to the withdrawal of concession. He relied on the case of **TB (Jamaica)** in relation to the need for finality of litigation. He relied on the case of **AK (Sierra Leone)** in particular paragraphs 32 and 49 which says that it is unjust that the Secretary of State should be entitled to resurrect her case and withdraw a concession which had been made. In this case he submitted that in considering the applications the Secretary of State will have to apply paragraphs 395C and D of the previous Immigration Rules and to undertake a freestanding Article 8 assessment. He submitted that this concession was justified in this case as a result of the huge delay in dealing with this application which was only considered in 2015 as a result of judicial review. The delay here was significant and explains why the Secretary of State has clearly decided to apply the position at an earlier point in time.

15. In response Mr Duffy submitted that the potential application of paragraphs 395 in the old Rules was not very different to the situation to be assessed under 276ADE. He submitted that 276ADE (1)(iv) is more generous than the previous positions therefore there is no prejudice to the Appellants. He submitted that a further hearing may arise from any decision of the Secretary of State and that that would lead to further expense in any event.

Discussion and Conclusions

16. It was not in dispute before me that, as the decision in **Singh** makes clear, the transitional provisions apply in these appeals so that, although the applications were made before the change to the Immigration Rules on 9 July 2012, when making her decisions on 10 July 2015, the Secretary of State was obliged to consider the application under the provisions of the Immigration Rules introduced on 9 July 2012.

17. Accordingly, the Appellants' representative was mistaken as to the law when, as noted at paragraph 12 of the decision, he submitted that the wrong law had been

applied by the Secretary of State in considering these applications. The judge made a mistake as to the law at paragraph 12 in finding that the respondent had wrongly applied the provisions of Appendix FM and in his conclusion that he should allow the appeals as the decisions were not in accordance with the law. Had there been no Presenting Officer at the hearing or if the Presenting Officer had not agreed with that analysis this would be a straightforward material error of law on the part of the First-tier Tribunal.

18. The only issue here is whether the fact that the Presenting Officer agreed with this analysis [12, 27] means that the Secretary of State is now prevented from seeking to have the decision of the First-tier Tribunal set aside.

19. Mr Gill relied on a number of cases to support his contention that the Secretary of State is unable to seek to have the decision of the First-tier Tribunal overturned.

20. The case of **TB (Jamaica)** does not, in my view, assist the Appellants because that case involved the Secretary of State seeking to bypass the decision of the First-tier Tribunal by making a further decision. That is a very different scenario to that in the instant case. The appeal to the Upper Tribunal in this case is still part of the current appeal and not a part of an attempt by the Secretary of State to circumvent the appeals process.

21. Mr Gill also relied on the decision in **IBM Ltd v Dalgleish** where the Court of Appeal considered whether it was appropriate for a party to raise a new point on appeal. The Court said at paragraph 450;

> "It is a matter of discretion for the court whether to allow a party to raise on appeal a point not relied on below. If it is a pure point of law arising entirely on facts which were already before the court, then the court may allow it to be taken if no possible prejudice would be caused to the other party as regards the conduct of the trial, as in *Pittalis v Grant* [1989] QB 605. However, in a case in which, if the point had been taken below, the evidence adduced or the course of the trial might have been different in some material respect, then the new point will not be allowed to be raised…"

22. The instant case is closer to the first scenario described in paragraph 450 being a point of law arising on the facts already before the First-tier Tribunal. I do not agree with Mr Gill's submission that this was not a concession as to the law but a concession that a more favourable set of Immigration Rules apply. The decision does not frame the concession in the way suggested by Mr Gill. It is clear from reading the decision that the concession was based on a misapprehension as to the law on the part of the Presenting Officer, the Appellants' representative and the judge.

23. In the case of **AK (Sierra Leone)** Jackson LJ reviewed the case law relating to the making and withdrawal of concessions as follows:

> "31. Having regard to the way that the grounds of appeal have been framed and the way that the appeal has been argued today, I shall begin by reviewing the law concerning the making and withdrawal of concessions.

32. Carcabuk, appeal number 00/TH/01426 dated 18 July 2000 was a decision of the Immigration Appeal Tribunal comprising Collins J and Mr Ockelton dealing with two cases where issues arose concerning concessions made by the Secretary of State. The concessions concerned the credibility of the Claimants in two cases at hearings before the adjudicator. In paragraph 11 of his judgment, Collins J, delivering the judgment of the Immigration Appeal Tribunal, held that concessions of fact made by a Home Office Presenting Officer may be queried by a adjudicator, but if the Home Office Presenting Officer maintained the concessions, they bound the adjudicator. Nevertheless, the Secretary of State may be able to withdraw the concessions on appeal.

33. In Opacic, appeal number 01/TH/00850 dated 15 May 2001, the Immigration Appeal Tribunal reviewed the application of the principles stated in Carcabuk to different circumstances. The Immigration Appeal Tribunal noted that in Carcabuk the concessions under consideration related to credibility, whereas in the matters before the Immigration Appeal Tribunal, the concessions were in a different context. At paragraph 22, the tribunal said:

> "Where an appeal has been conceded in its entirety, as in these cases, we do not consider that such a concession can be withdrawn and we see nothing in Carcabuk and Bla that leads us to any contrary view."

34. In Secretary of State for the Home Department v Davoodipanah [2004] EWCA Civ 106 an issue arose about a concession made by the Secretary of State. Kennedy LJ, with whom Clarke LJ and Jacob LJ agreed, said that the Immigration Appeal Tribunal had power to allow withdrawal of a concession. The tribunal would exercise that power in order to do justice in the circumstances of the case.

35. In NR (Jamaica) v Secretary of State for the Home Department [2009] EWCA Civ 856 the Home Office Presenting Officer made two different concessions at separate hearings. The first concession was that if the appellant was a lesbian, she would be at real risk on return. The second concession made at a separate hearing was that the appellant was indeed a lesbian and in a relationship with a woman called Ms S in 2006 and 2007. The Asylum and Immigration Tribunal allowed the Secretary of State to withdraw both the concessions. The Court of Appeal upheld that decision. Goldring LJ, with whom Lloyd LJ and Mummery LJ agreed, stated at paragraph 12:

> "As Kennedy LJ makes clear, the Tribunal may in its discretion permit a concession to be withdrawn if in its view there is good reason in all the circumstances for that course to be taken. Its discretion is wide. Its exercise will depend on the particular circumstances of the case before it. Prejudice to the applicant is a significant feature. So is its absence. Its absence does not however mean that an application to withdraw a concession will invariably be granted..."

36. The Court of Appeal applied those principles in CD (Jamaica) v Secretary of State for the Home Department [2010] EWCA Civ 768, but that judgment does not call for any further discussion.

37. Similar issues arose in a case in this court last week, namely Koori v Secretary of State for the Home Department [2016] EWCA Civ 552. The appellants in that case contended that they

could benefit from rule 276ADE(iv) of the Immigration Rules. That rule provided that the requirements to be met by an applicant for leave to remain on the grounds of private life in the UK were that the applicant was under the age of 18 years and had lived continuously in the UK for at least seven years, discounting any period of imprisonment, and that it would not be reasonable to expect the applicant to leave the UK.

38. Mr Malik on behalf of the appellants contended that the Secretary of State had conceded that the seven year rule was satisfied. Mr Malik failed in that submission on the facts. In relation to the issue of principle, however, Elias LJ, with whom Underhill LJ and Peter Jackson J agreed, said this at paragraph 31:

> "I would accept that if there had been a considered and lawful decision to deem the seven year rule to be satisfied, the Secretary of State should not be allowed to resile from that decision. An administrative body cannot keep revisiting decisions which affect individual rights: there must be finality, at least unless there is a powerful public interest to the contrary."

39. Bearing in mind that guidance from the authorities, I turn to the Upper Tribunal decision in the present case. The Upper Tribunal Judge deals with withdrawal of the concession in paragraph 39. I have read that paragraph out in part 3 of this judgment. He simply says that he follows NR and considers that the Secretary of State is entitled to withdraw her concession. There is no analysis of the circumstances of the case. There is no consideration of prejudice. There is no consideration of the interests of justice. The Upper Tribunal Judge did not have to make any finding about the extent of the concessions because the argument was presented on the simple basis that they had been withdrawn."

24. Having determined the correct approach in that appeal, he went on at paragraph 49 to say;

"49. I do not need to go so far as to say that in such circumstances the Secretary of State could never appeal to the Upper Tribunal, but on the facts of this particular appeal, it seems to me quite unjust that the Secretary of State, having conceded on all points, should be entitled to resurrect her case and withdraw the concessions which she had made. As Mr Fortt rightly concedes, the Upper Tribunal gave no good reason for allowing the Secretary of State to take that course."

25. Looking at the cases reviewed in **AK** I note the guidance given by Kennedy LJ in the Court of Appeal in **Davoodipanah** at paragraph 22;

"It is clear from the authorities that where a concession has been made before an adjudicator by either party the Immigration Appeal Tribunal can allow the concession to be withdrawn if it considers that there is good reason in all the circumstances to take that course. (See, for example, Ivanauskieine v Secretary of State for the Home Department 2001 EWCACiv 1271, and Carrabuk v Secretary of State for the Home Department, a decision of the Immigration Appeal Tribunal presided over by Mr Justice Collins on 18 May 2000. Obviously if there will be prejudice to one of the parties if the withdrawal is allowed that will be relevant and matters such as the nature of the concession and the timing may also be relevant, but it is not essential to demonstrate prejudice before an application to withdraw a concession can be refused. What the tribunal must do is to try to obtain a fair and just result. In the absence of

prejudice, if a Presenting Officer has made a concession which appears in retrospect to be a concession which he or she should not have made, then probably justice will require that the Secretary of State be allowed to withdraw that concession before the Immigration Appeal Tribunal. But, as I have said, everything depends on the circumstances, and each case must be considered on its own merits."

26. I would firstly say that I accept Mr Duffy's submission that the application for permission to appeal was in effect an application to withdraw the concession. This is clear from the terms of the application; alternatively it is implied from the application for permission to appeal and the basis of that application.

27. It is clear from the authorities above that in considering whether the Secretary of State can now withdraw her concession I must look at whether there is good reason to allow the concession to be withdrawn. I must consider all of the circumstances of the case, including looking at whether there has been any prejudice to one of the parties. I should also consider the nature of the concession and the timing. I should also bear in mind the aim of obtaining a fair and just result.

28. It is necessary to look at all of the circumstances in this case. The concession was one of law not fact. As set out above I do not accept Mr Gill's submission that the concession was a decision on the part of the Secretary of State to apply a more favourable set of Rules to these Appellants. The concession here was made in the context of the Appellants' representative's submissions which were based on a mistake as to the law. The judge agreed with those submissions and it seems that it was at that stage that the Presenting Officer agreed that the respondent had wrongly applied the post-July 2012 Immigration Rules. Therefore the Presenting Officer made the concession, not on a decision to treat the Appellants more favourably than others, but based on a mistaken interpretation of the law on his part and that of the Appellants' representative and the First-tier Tribunal Judge. A wrongly made concession on the law is different from a concession as to the facts which can be made where the Secretary of State is satisfied that the evidence presented reaches a certain threshold.

29. Apart from delay, there is no clear prejudice to the Appellants in allowing the withdrawal of the concession. The erroneous approach of the First-tier Tribunal Judge put the Appellants in a position whereby their cases were to be considered by the Secretary of State on the basis of pre-July 2012 Immigration Rules. I agree with Mr Duffy's submission that it is not apparent that the previous Immigration Rules would necessarily be more favourable to the Appellants. Further, if the Secretary of State refused the applications again the Appellants would be faced with a further appeal to the First-tier Tribunal based on the erroneous decision of the First-tier Tribunal on this occasion thus potentially leading to confusion and further exacerbating the error. On the other hand, should the decision be set aside and the appeals remitted to the First-tier Tribunal, the Appellants have the opportunity to present their cases according to the applicable legal provisions and are more likely to

obtain a legally sound decision. Therefore there can be little prejudice to the parties to have the appeals remitted to the First-tier Tribunal.

30. Fundamentally the issue here is that the First-tier Tribunal Judge made a material error of law in his disposal of this appeal. In all of the circumstances of this case, this error cannot be corrected with reference to a wrongly made concession by the Presenting Officer.

31. The parties agreed that, should I set aside the decision of the First-tier Tribunal, the remaking of the decision requires fresh findings of fact. Therefore, in line with paragraph 7 of the Tribunal Practice statement, in light if the nature and extent of the judicial fact finding required in order to re-make the decision, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

Notice of Decision

The decision of the First-tier Tribunal contains a material error of law.

The decision of the First-tier Tribunal is set aside.

The appeal is remitted to the First-tier Tribunal for a de novo hearing

- The hearing is to be held at Hatton Cross, not before First-tier Tribunal Judge Greasley
- A Bengali Sylheti interpreter is required
- The estimated hearing time is two hours.

No anonymity direction is made.

Signed Date: 2nd October 2017

Deputy Upper Tribunal Judge Grimes