



IAC-FH-CK-V1

**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/14448/2019
HU/14455/2019**

THE IMMIGRATION ACTS

**Hearing held at Field House
On 26th January 2022**

**Decision & Reasons
Promulgated
On 09th March 2022**

Before

**UPPER TRIBUNAL JUDGE L SMITH
UPPER TRIBUNAL JUDGE KEITH**

Between

**MR ASIF AHMED
MRS AYESHA ZEBIN
(ANONYMITY DIRECTIONS NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr P Saini, Counsel, instructed by Brit Solicitors

For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is a decision in respect of whether a Judge of the First-tier Tribunal, Judge Cartin, erred in law in his decision, promulgated on 24th June 2021, following a hearing at Taylor House on 30th April 2021, conducted via CVP. These are the written reasons which reflect our oral decision, given at the end of the hearing.

2. We summarise briefly the Judge’s decision; the grounds of appeal; and the subsequent progress of the litigation.

The Judge’s decision

3. The Judge had considered an appeal against the respondent’s refusal on 9th August 2019 of the appellants’ applications on 8th March 2019 for indefinite leave to remain and for leave to remain on the basis of their human rights. The circumstances of the applications were that the appellants, a married couple, with two UK-born but Bangladeshi national children, relied on the lengthy period in which they had been present in the UK; their prolonged absence from their country of origin, Bangladesh; their young children’s circumstances; and their immigration history, relating to earlier unsuccessful applications, which it was said were refused unfairly. A particular feature of the appeal before the Judge, on which he elaborated at §17 of his decision, related to the first appellant’s complaint that he had made an application on 16th February 2017, in respect of which the respondent had only made a refusal decision on 4th July 2018. The appellants claimed that this delay, coupled with the fact that they had been unaware of the withdrawal of a Certificate of Sponsorship (“CoS”) by the first appellant’s potential employer, which would otherwise have been valid at the time of the decision, was unfair. They claimed that the unfairness was exacerbated by the respondent’s failure to follow her own procedural guidance in relaying the withdrawal of the CoS to the appellants, to give them the chance to rectify their position. The consequence was that the appellants were prevented from relying on an otherwise potentially lawful period of residence.
4. The Judge regarded the challenge as being an out-of-time challenge to the 2018 decision, which ought properly to have been a timeous judicial review application (§28). He concluded that he had no jurisdiction to consider such a challenge, and in doing so, distinguished the case of R (Pathan) v Secretary of State [2020] UKSC 41. He went on to conclude, critically, at §38:

“The arguments made on book-ended leave take the appeal no further. They are based on the supposition that if ‘properly’ considered the respondent would have granted the appellants leave in 2018. This relies upon the above argument that the previous unappealed decision was wrong, which is not accepted and which I do not make substantive findings on now, for reasons given.”

The appellants’ grounds of appeal

5. The appellants sought permission to appeal against the Judge’s decision on 13th July 2021, raising four grounds:
 - (a) Ground (1) – the Judge had erred in distinguishing Pathan. The jurisdictional issue raised by the Judge was a new issue, and in doing so, the Judge had failed to carry out an analysis as required in Patel (historic injustice; NIAA Part 5A) [2020] UKUT 00351 (IAC), namely to

consider whether a past injustice could have a bearing on the proportionality of a later decision.

- (b) Ground (2) - the Judge never raised the jurisdictional issue at the hearing, depriving the representatives of the opportunity to address it.
- (c) Ground (3) - the Judge's conclusion on the applicability (or otherwise) of Pathan was perverse.
- (d) Ground (4) - the Judge had failed to assess the appellants' family life, concentrating instead solely on their private lives.

Progress of the litigation

- 6. A Judge of the First-tier Tribunal, Judge Andrew considered the appellants' application for permission to appeal. She noted and was concerned by the inflammatory language used in parts of the grounds, drafted by Counsel, which she regarded as wholly unnecessary. We concur with her view. Nevertheless, she was satisfied that the Judge may arguably have erred in not following the guidance in Patel. She granted permission on all grounds in a decision of 1st October 2021.
- 7. In response, the respondent has provided a Rule 24 response of 12th January 2021 in which she states:
 - "2. The respondent does not oppose the appellants' application for permission to appeal and invites the Tribunal to determine the appeal with a fresh oral (continuance) hearing....
 - 3. It is accepted that the FTTJ materially erred for the reasons set out in ground 1, namely failing to make findings as to the issue of alleged procedural unfairness and the impact of such findings within an Article 8 assessment. Whilst the FTTJ makes a number of observations at [§30-38] to which the SSHD would submit are well-reasoned and based in law.... the FTTJ clearly set out at [38] that substantive findings have not been made.
 - 4. In failing to make findings of fact it is considered that remittal to the First-tier Tribunal would be the most appropriate course of action."
- 8. We have subsequently received from the appellants an additional skeleton argument which urges us to accept the concession, which Mr Whitwell confirmed today is maintained. The appellants also urge us to remit remaking to the First-tier Tribunal. We conclude that the respondent's concession is properly made and that the Judge erred in law, for the reasons conceded by the respondent in relation to ground (1) alone. It is unnecessary for us to reach any conclusions in relation to grounds (2) to (4).
- 9. We have also considered how the decision on the appellants' appeal should be remade, by reference to paragraph 7.2 of the Senior President's

Practice Statements (2012). Bearing in mind that the error of law includes consideration of procedural fairness, we accept that it is appropriate for the appeal to be remitted to the First-tier Tribunal. In remitting the matter to the First-tier Tribunal, none of the Judge's findings are preserved.

Notice of Decision

The decision of the First-tier Tribunal contains errors of law and we set it aside.

We remit this appeal to the First-tier Tribunal for a complete rehearing.

Directions to the First-tier Tribunal

This appeal is remitted to the First-tier Tribunal for a complete rehearing with no preserved findings of fact.

The remitted appeal shall not be heard by First-tier Tribunal Judge Cartin.

No anonymity direction is made.

Signed **J. Keith**

Date: 7th February 2022

Upper Tribunal Judge Keith