



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: IA/20015/2013
IA/20033/2013
IA/20026/2013

THE IMMIGRATION ACTS

Heard at Field House

On 4 December 2013

Approved Ex Tempore Judgment

**Determination
Promulgated**

On 24 January 2014

Before

**The Hon. Mr Justice McCloskey, President
Upper Tribunal Judge Eshun**

Between

**RIMA VOLTERKUMAR MEKWAN
VOLTERKUMAR MANUBHAI MEKWAN
ANGEL VOLTERKUMAR MEKWAN**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Atit Mehta , instructed by Malik & Malik Solicitors

For the Respondent: Mr Tarlow, Senior Home Office Presenting Officer

DECISION, DIRECTION AND REMITTAL

1. This is an appeal against the Determination of the First-tier Tribunal promulgated on 18 September 2013.

2. On 25 June 2012, the Secretary of State made a decision whereby she refused to grant leave to remain to the Appellant Miss Mekwan. It is common case that the next relevant date is 23 May 2013, highly surprising though that may seem, since that date represents the date of service of the Secretary of State's adverse decision. Next, on 28 May 2013 the Appellant challenged this by Notice of Appeal to the First-tier Tribunal.
3. In the Notice of Appeal the Appellant explicitly opted for a paper Determination. Following this, on 22 July 2013, the First-tier Tribunal's Secretariat sent a procedural direction to both parties. It is common case that both parties received it. The directions said the following:

"It is argued by the Respondent that the Appellant does not have a right of appeal under s82 of the Nationality Immigration and Asylum Act 2002 because she did not apply for leave to remain until after the expiry of his existing leave. This is because a prior application made during the currency of that leave was not accompanied by the correct fee".

It is agreed that the onus of proof was on the Respondent to show that the correct fee was not paid. Following this narrative the procedural direction continued:

"It is therefore directed that the appeal be listed for a substantive hearing that at that substantive hearing the issue of validity be decided, and that at least 14 days prior to the substantive hearing the Respondent lodge with the Tribunal and serve upon the Appellant any information showing that the correct fee was not paid".

4. The next material development occurred on 9 August 2013 when the Respondent sent a bundle of papers to the First-tier Tribunal. Interestingly, the covering letter described this as a paper case and, furthermore, a date of 19 August 2013 was inserted. We are not sure what that date denotes. In any event, at today's hearing this Tribunal has raised the question of whether the bundle received by the First-tier Tribunal from the Secretary of State contained any material compliant with the requirement enshrined in the procedural direction, which required "any information showing that the correct fee was not paid". It is candidly acknowledged by Mr Tarlow on behalf of the Secretary of State that this information was not included. In the meantime, notwithstanding the clear signal given in the procedural direction that the appeal would be listed for a substantive hearing and that the validity of the appeal issue would be examined at such hearing and duly determined, the appeal proceeded as a paper exercise. This, according to the Determination, was carried out on 27 August 2013.

5. Next, on 16 September 2013 the Appellant's solicitors received the Secretary of State's bundle. They reacted immediately on 17 September 2013 by sending the Appellant's bundle to the First-tier Tribunal. On 18 September 2013, the Determination of the First-tier Tribunal was promulgated.
6. It is abundantly clear from the text of this Determination that it does not comply with the procedural direction. The latter enunciated that at a substantive hearing the issue of validity would be decided. The exercise of deciding the appeal on paper was in breach of that direction in three fundamental respects. The first was that it did not entail a substantive hearing which would have been inter-partes and would have considered all the evidence and arguments from both parties. The second was that it did not either investigate or determine the jurisdictional issue of validity of the appeal. The third defect that occurred was that this exercise was carried out in circumstances where the Secretary of State had not complied with the requirement to provide any information showing that the correct fee was not paid. Thus the Determination of the First-tier Tribunal was highly irregular. It is not clear how this came about and we do not purport to attribute blame to any person or agency. The fact is that all of these irregularities materialised. They had a number of consequences. One of the fundamental consequences was that the Appellants were deprived of their elementary right to a fair hearing in several significant respects.
7. For completeness, we record that the Determination of the First-tier Tribunal was received by the Appellant's solicitors on 20 September 2013 and they sought permission to appeal in writing on 23 September 2013. This was duly granted. On 7 October 2013, in granting permission to appeal the Judge was not privy to much of what we have just rehearsed. The Judge was, however, alert to what was described as an arguable material error of law, which was formulated in the following way. The First-tier Tribunal Judge was required to consider the issue of the validity of the appeal in the first instance and should have been assisted by information provided by the Respondent which appears not to have been provided. As the inquiry which we have conducted today demonstrates, the irregularities and procedural improprieties which beset the procedure adopted by the First-tier Tribunal and the ensuing Determination were multiple and fundamental in nature.
8. For these reasons the Determination of the First-tier Tribunal cannot survive. It must be set aside and we so order. Given that the Appellants have been deprived of their right to a fair and proper hearing at first instance, which right when exercised would preserve their right of appeal with permission to this Tribunal, we are in no doubt that the appropriate course is not to remake the decision in this forum but is, rather, to remit the matter to a differently constituted First-tier Tribunal for fresh consideration and Determination.

9. We are empowered to give directions about the conduct of that hearing. Conventionally, this Tribunal declines to do that because it is normally better that the First-tier Tribunal address its mind to matters of a procedural nature. However given the nature of the irregularities which we have identified and which form the

10. basis of this decision we will give one procedural direction: the fresh hearing before the First-tier Tribunal differently constituted will proceed on a conventional inter-partes basis on proper notice to both parties.

Bernard McCloskey.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE

UPPER TRIBUNAL

IMMIGRATION AND ASYLUM CHAMBER

Date: 23 January 2014