



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

Appeal Number: IA/25265/2012

**THE IMMIGRATION ACTS**

**Heard at Field House  
on 15<sup>th</sup> November 2013**

**Determination  
Promulgated  
on 17<sup>th</sup> January 2014**

**Before**

**UPPER TRIBUNAL JUDGE HANSON**

**Between**

**ROMA MAHESHKUMAR GURJAR  
(Anonymity direction not made)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Nasim instructed by Malik & Malik Solicitors.

For the Respondent: Mr Melvin – Senior Home Office Presenting Officer.

**DETERMINATION AND REASONS**

1. This is an appeal against a determination of First-tier Tribunal Judge Scobbie promulgated on 23<sup>rd</sup> January 2013 in which he dismissed the Appellant's appeal under both the Immigration Rules and on human rights grounds against the refusal of the Secretary of State to vary her leave to allow her to remain in the United Kingdom as the dependent of a points-based migrant, her husband.
2. Permission to appeal to the Upper Tribunal was not admitted by First-tier Tribunal Judge Maller who noted that the application should have been lodged by 1<sup>st</sup> February 2013 but was not in fact received until 7<sup>th</sup> February 2013. No explanation was provided for why the application was late and so it had not been established that special circumstances existed such that it would have been unjust not to extend time. The

application was renewed the Upper Tribunal and considered by Upper Tribunal Judge Chalkley who, in a decision dated 3<sup>rd</sup> April 2013, granted permission to appeal on the following basis:

4. However, the First-tier Tribunal Judge did not consider the appellant's Article 8 appeal despite the fact that she raised an assertion that the refusal was contrary to her European Fundamental Freedoms rights. On this issue only, I grant permission.

### **Preliminary issue - Timeliness**

3. Although Judge Chalkley purports to have granted permission to appeal to the Upper Tribunal there is no reference to any decision being made regarding the fact the appeal was out of time. The renewed application to the Upper Tribunal contains no explanation for why the application was filed late, contains no application for extending time, and contains a material misrepresentation when stating in section 10 that the First-tier Tribunal did not refuse to admit the application because it was late. No explanation was provided for such a misleading statement being made by Malik & Malik.
4. In [Boktor and Wanis \(late application for permission\) Egypt \[2011\] UKUT 00442 \(IAC\)](#) the Tribunal held that where permission to appeal to the Upper Tribunal has been granted, but in circumstances where the application is out of time, an explanation is provided, but that explanation is not considered by the judge granting permission, in the light of **AK (Tribunal appeal - out of time) Bulgaria [2004] UKIAT 00201 (starred)** and the clear wording of rule 24(4) of the Asylum and Immigration (Procedure) Rules 2005, the grant of permission to appeal is conditional, and the question of whether there are special circumstances making it unjust not to extend time has to be considered.
5. I admit the appeal because having considered the guidance provided in the case law, the lack of prejudice to either party, the merits of the appeal and the interests of fairness, it is appropriate for me to do so. This is not challenged by either party.

### **Discussion**

6. The only ground on which permission was granted relates to Article 8 ECHR although Mr Nasim applied for leave to raise an issue relating to the Rules in addition. Permission was granted for him to make submissions on this issue in the interests of justice as it is determinative of the appeal.
7. The Respondents refusal letter is dated 25<sup>th</sup> October 2012. It states that on 20<sup>th</sup> May 2012 the Appellant made an application for leave to

remain as the dependant of a PBS Migrant but that the her partner was not included in the application. The challenge to this assertion is based upon the fact that the applications for the Appellant and her husband were submitted at the same time and her husband's application granted. The applications were made 'in time' and the reference in the refusal to the date of submission being 20<sup>th</sup> May 2013 is incorrect. Mr Nasim stated that both applications were made on 30<sup>th</sup> May 2012 and, I note, that of the Appellant is date stamped as having been received on 1<sup>st</sup> June 2012 by the Respondent. Mr Melvin accepted that on the correct facts the Appellant is entitled to succeed and so I set the determination of First-tier Tribunal Judge Scobbie aside and allow the appeal on this basis under the Rules.

8. As the appeal has been allowed under the Rules it is not necessary for me to consider Article 8 ECHR or the issues arising from the s. 47 direction which is now academic.

### **Decision**

9. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is allowed.**

Anonymity.

10. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make no such order as no application has been made and the need for such an order is not established on the facts

Fee Award.

Note: this is **not** part of the determination.

11. In the light of my decision to re-make the decision in the appeal by allowing it, 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 a whole fee award.

Reasons: The decision to refuse was based upon a mistake of fact and the Appellant has succeeded.

Signed.....  
Upper Tribunal Judge Hanson

Dated the 13<sup>th</sup> January 2014