



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

Appeal Numbers: IA/33008/2013
IA/41883/2013

THE IMMIGRATION ACTS

Heard at Field House

Determination

On 26 June 2014

Promulgated

On 2 July 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE APLEYARD

Between

**MR KRUSHNAKANT SHAH (FIRST APPELLANT)
MRS MINAXIBEN KRUSHNAKANT SHAH (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr. Z. Malik, Counsel.

For the Respondent: Mr. L. Tarlow, Home Office Presenting Officer.

DETERMINATION AND REASONS

1. The appellants are citizens of India. They are husband and wife. They entered the United Kingdom on 23 June 2004 with a valid visit visa which expired on 4 December 2004. They did not leave the United Kingdom

before their leave expired and remained illegally, taking no steps to regularise their immigration status until December 2011 when they made an application for discretionary leave to remain. It was refused in a decision dated 30 July 2013 and decisions were then taken to remove them from the United Kingdom in accordance with Section 10 of the Immigration and Asylum Act 1999.

2. The appellants' appealed and following a hearing before Judge of the First-tier Tribunal Harrington their appeals were dismissed under both the Immigration Rules and on human rights grounds.
3. Permission to appeal to the Upper Tribunal was granted by Judge of the First-tier Tribunal Nicholson on 8 May 2014. His reasons are as follows:-

- "1. First-tier Tribunal Judge Harrington dismissed the appellants' appeals against refusal to vary leave and removal to India in a determination promulgated on 26 March 2014.
2. The appellants were overstayers. They applied for leave to remain under Article 8 outside of the Rules before 9 July 2012. The respondent refused the applications on the grounds that they did not meet the requirements of paragraph 276ADE or Appendix FM of the new Rules.
3. The grounds contend that the judge should have found that that decision was not in accordance with the law.
4. In **Edghill v SSHD [2014] EWCA Civ 402**, at paragraph 33, the Court of Appeal indicated that where an application was made before 9 July 2012 and refused under Article 8 by the respondent solely by reference to the new Rules then the decision was not in accordance with the law.
5. Given the judge's clear factual findings and bearing in mind that it is a criminal offence to overstay under Section 24 of the 1971 Act, it may well be that these appeals have little if any prospect of success. Nonetheless, in the light of the decision by the Court of Appeal the grounds are arguable. Permission to appeal is accordingly granted."

Thus the appeal came before me today.

4. Mr. Malik relied on one ground, namely, that the immigration decision that triggered the appeal was not in accordance with the law and that the First-tier Tribunal erred in law in not finding so and in assuming that the answer to the third question of **R (Razgar) v Secretary of State [2004] UKHL 24** is in the affirmative.
5. The respondent refused the appellant's Article 8 claim solely by reference to paragraph 276ADE under Appendix FM of the Immigration Rules HC 395 (as amended). This, Mr. Malik contended, was unlawful because

paragraph 276ADE and Appendix FM were part of HC194 which was laid before Parliament under Section 3(2) of the Immigration Act 1971 on 13 June 2012. Therein, under the heading "Implementation" it states:-

"... the changes set out in this Statement shall take effect on 9 July 2012 ...

However, if an application for entry clearance, leave to remain or indefinite leave to remain has been made before 9 July 2012 and the application has not been decided, it will be decided in accordance with the Rules in force on 8 July 2012".

6. I was directed to two conflicting authorities. Firstly, that of **Edghill and Bhoyroo [2014] EWCA Civ 402**. In short, Mr. Malik contended that the respondent's decision here, following this authority was an unlawful one.
7. He distinguished the authority of **Haleemudeen [2014] EWCA Civ 558** on the basis that **Edghill** had not been cited therein and that the implementation provisions had not been drawn to the attention of the court. **Haleemudeen** comes to the opposite conclusion on the issue to that decided in **Edghill**.
8. Mr. Tarlow resisted the application arguing that in any event as the appellants' Article 8 claims had such little merit in them, and accordingly little prospect of success, the error made by the judge in the First-tier was not material.
9. At the hearing I indicated to the parties that it was my intention to follow the authority of **Edghill**. Whilst I took account of Mr Tarlow's submission I felt in the circumstances that I could attach little weight to it. These appellants' applications were made before 9 July 2012 and decided after, so they are entitled to the benefit of the transitional provisions in the amendments to the Immigration Rules which came into effect on 9 July 2012.
10. Accordingly, I set aside the First-tier Tribunal's determination and remake it.
11. The appeals are allowed on the basis that the respondent's decisions were not in accordance with the law and to the limited extent that the appeals are remitted back to the respondent for the making of a lawful decisions.

Decision

12. Appeals allowed.

Signed

Date 30 June 2014.

Deputy Upper Tribunal Judge Appleyard