Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/13482/2014

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On 10th September 2014	**On 26th September 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MRS RIANNE SCHESTOWITZ
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Khan, Counsel
For the Respondent: Mr G Harrison, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a citizen of the Philippines born on 24th August 1978. The Appellant entered the United Kingdom as a spouse of an EEA national on 9th September 2013 with entry clearance valid from 22nd July 2013 until

22nd January 2014. She submitted an application for leave to remain as a spouse on 20th January 2014 and that application was refused on 28th February 2014.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Narayan sitting at Stoke on the papers on 29th April 2014. In a determination promulgated on 13th May 2014 the Appellant's appeal was dismissed.

3. On 22nd May 2014 Grounds of Appeal were lodged to the Upper Tribunal. Those grounds contended:

   (i) that the First-tier Tribunal Judge had failed to consider the Appellant's appeal against the decision to remove her;

   (ii) that the judge had failed to deal with her entitlement to remain under the 2006 Regulations;

   (iii) had failed to consider whether her husband's status as a student counted towards the five years during which the Appellant's husband had exercised treaty rights; and

   (iv) had failed to consider Article 8 beyond the Immigration Rules.

4. On 27th June 2014 Immigration Judge Lever granted permission to appeal. He concluded that it was arguable that the Appellant's husband may have been exercising treaty rights in one form or another during the years that he was working on his thesis and that it was also the case that the judge had made no reference to Article 8 of the European Convention of Human Rights.

5. On 4th July 2014 the Secretary of State filed a response to the Grounds of Appeal under Rule 24. Those grounds oppose the appeal stating that the judge had considered the evidence in some detail at paragraph 17 of his determination and concluded on the basis of that evidence that the Appellant had not established on a balance of probabilities that her spouse was exercising treaty rights for the relevant duration of time and that that was a finding open to the judge and that it was for the Appellant to make her case and provide the necessary evidence. Further it was contended as to Article 8 that it was clear that the judge had dealt with this to the extent that was necessary under the guiding case law at paragraph 20 and 21 of his determination. The Rule 24 response maintained that there was no material error of law in the determination.

6. It is on that basis that the appeal comes before me today, firstly to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The Appellant appears by her instructed Counsel Ms Khan. Ms Khan is familiar with this matter having been the author of the Grounds of Appeal to the Upper Tribunal. The Secretary of State appears by her Home Office Presenting Officer Mr Harrison.

Discussions/Submissions

7. Mr Harrison starts by submitting that if the evidence was not before the judge and that there was no representative present to put the evidence because the appeal was dealt with on the papers then it is not reasonable to criticise the judge so far as his findings are concerned. However Mr Harrison concedes three factors.

   (i) the Appellant's husband is definitely a European;

   (ii) that the Appellant and her husband are married;

   (iii) that the Appellant's husband is working.

   He points out that it was the Appellant who sought to appeal on the papers rather than to seek an oral hearing and that it is for the Appellant to show that her husband was exercising treaty rights. He submits there is no material error of law in the decision of the First-tier Tribunal.

8. Ms Khan takes me to the Grounds of Appeal. She submits that there was no requirement for the Appellant to submit a formal application under the Regulations and that where the facts quite clearly give rise to rights of residence under the 2006 Regulations they should have been considered by the Tribunal. She specifically refers me to the Respondent's ECI guidance on residence cards which states:

   > "An application form, EEA2, is available for use when applying for a residence card. However, an application cannot be rejected because the form has not been used or has not been fully completed."

9. She also refers me to extracts from the authority of *Alarape and Another (Article 12, EC Regulations 1612/68) Nigeria [2011] UKUT 413 (IAC)* and submits that the current application was completed without the assistance of legal representatives and she submitted the documents in relation to the appeal similarly without legal representatives' assistance and that it was incumbent upon the First-tier Tribunal Judge to consider the Appellant's rights under the Regulations and that his failure to do so amounts to a material error of law. Ms Khan submits that as removal directions had been set it was incumbent upon the judge to give due consideration as to whether or not the Appellant's husband was exercising treaty rights and that whether he was or was not was a matter of fact. The fact that the First-tier Tribunal Judge did not consider the issue of removal directions is in her view sufficient in any event to show that there is a material error of law.

The Law

10. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial consideration, reaching irrational

conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

11. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings on Error of Law

12. I have some sympathy with the position in which the First-tier Tribunal Judge found himself as all he had before him were the papers and he did not have the benefit of oral submissions or any other additional documents that might have been provided had the Appellant instructed solicitors. Having said that there are two specific factors which of themselves constitute material errors of law. Firstly the judge has failed to spot that removal directions have been issued by the Secretary of State. He has dismissed the appeal without even giving due reference to it. He should have done and that is a material error of law. Certainly it would have been appropriate for him to set aside the removal directions in the present circumstances. Secondly following *Alarape* it is incumbent for a First-tier Tribunal Judge to address whether or not an Appellant was entitled to an EU right of residence under Article 12 of Regulation 1612/68 and such circumstances in law apply in this case and it would have been appropriate for the judge to have looked at this on his own motion and his failure to do so amounts to a material error of law.

Findings on Remaking of the Decision

13. It is appropriate therefore to look at the factors in this appeal as at today's date. Mr Harrison advises he has no further representations to make. It is accepted by the Secretary of State in the Notice of Refusal that the Appellant's husband was exercising treaty rights and that he has been in employment since 2011. A bundle of documents was before the First-tier Tribunal Judge including wage slips and contracts of employment. The judge had the benefit of a statement of the main terms of employment that the Appellant's husband Mr Schestowitz held with Sirius Corporation

Limited, wage slips showing clearly that there would be no recourse to public funds by the Appellant and a letter from Sirius confirming that the Appellant's husband is a permanent full-time member of staff and has been employed with the company since 24th February 2011.

14. All the Appellant needs to show is that at the present time Dr Schestowitz is exercising treaty rights. He is employed as a support engineer by Sirius. He is exercising treaty rights and documentation is available to show this. In such circumstances the Appellant's appeal is allowed under the Immigration (European Economic Area) Regulations 2006.

Decision

15. The decision of the First-tier Tribunal contained a material error of law and is set aside. The decision is remade allowing the appeal of the Appellant under the Immigration (European Economic Area) Regulations 2006.

16. The First-tier Tribunal did not make an order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. No application is made to vary that order and none is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris