



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

Appeal Number: AA/09484/2014

THE IMMIGRATION ACTS

Heard at Manchester

On 11th May 2016

**Decision & Reasons
Promulgated
On 4th July 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

**MS A S
(ANONYMITY RETAINED)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Nicholson, Counsel

For the Respondent: Mr M Diwnycz

DECISION AND REASONS

1. The Appellant is a citizen of Russia born on [] 1987. The Appellant claims to have arrived in the UK on 5th October 2011 after travelling on her own national passport and entering using a student visa which expired on 13th March 2012. The Appellant had applied for leave to remain as a Tier 4 Student in April 2011 and this had been granted and thereafter she applied for a residence card on 1st March 2013 and was granted five years' leave to remain under *Zambrano* on 11th September 2013 to 11th September 2018. The Appellant however, according to the Home Office records, claimed asylum on 8th April 2013. That application noted that the Appellant claimed asylum based on a fear that if returned to the Russian Federation she would face mistreatment due to the abuse she suffered from her stepfather, her conversion from Christianity to Islam and the fact that she had a child of mixed race. That application was refused by Notice of Refusal dated 22nd October 2014.
2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Lever sitting at Manchester on 15th September 2015. In a decision and reasons promulgated on 2nd October 2015, whilst the Appellant's appeal was dismissed on asylum grounds and she was found not to be entitled to humanitarian protection, her appeal was allowed pursuant to Article 8 of the European Convention of Human Rights.
3. On 2nd February 2015 the Secretary of State lodged Grounds of Appeal to the Upper Tribunal. Those grounds contended that as the Appellant had been issued with a residence card the appeal before the judge was on asylum grounds only under Section 83(2) of the 2002 Nationality and Immigration Act. As the judge had dismissed this aspect of the Appellant's appeal, following Schedule 2 of the EEA Regulations, it was contended the Appellant had no right of appeal on human rights grounds. Consequently it was submitted that the judge had materially erred in law in going on to consider and allow the appeal under Article 8 of the European Convention of Human Rights. Further it was contended that the judge had made a mistake as to a material fact in that in giving his reasons at paragraphs 30 and 31 allowing the appeal under Article 8 he stated:

"In what I do acknowledge to be an unusual situation the potential interference with the Appellant's private life by depriving her of the right to work is in itself contrary to the public interest in the circumstances of this case."

Contrary to the findings of the judge the Appellant has permission to work and that the judge's mistake of fact materially affected the decision on proportionality.

4. On 22nd October 2015 First-tier Tribunal Judge Holmes granted permission to appeal. The Appellant has lodged no Rule 24 response. It is on this basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. For the purpose of continuity throughout the legal process Ms Savina is referred to herein as the Appellant and the Secretary of State as the

Respondent albeit that this is an appeal by the Secretary of State. The Appellant appears by her instructed Counsel Mr Nicholson. Mr Nicholson is familiar with this matter having appeared before the First-tier Tribunal. The Secretary of State appears by her Home Office Presenting Officer Mr Diwnycz.

Submissions/Discussions

5. This matter is made considerably less contentious by the acceptance by Mr Nicholson of the Grounds of Appeal. He indicates however that the judge was doing his best in a complex situation to grapple with the consequences that would arise and he also wishes to point out that there is no cross appeal extant before the Tribunal with regard to the Appellant's claim for asylum and/or humanitarian protection. Mr Diwnycz agrees with this analysis referring me to comments made by Mr Bilsland and he asked me to exercise discretion and to remit the matter back for rehearing.

The Law

6. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
7. 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

8. Effectively what Judge Lever has done could be described as a 'belt and braces' decision. Section 83(2) of the Nationality, Immigration and Asylum Act 2002 was abolished on 20th October 2014. The Notice of Refusal postdates that event.

9. Schedule 2 Paragraph 1.(2) of the Immigration (EEA) Regulations 2006 states *“Where a person has leave to enter or remain under the 1971 Act which is subject to conditions and that person also has a right to reside under these Regulations, those conditions shall not have effect for as long as the person has a right to reside.”* Consequently the Appellant is not excluded from having her appeal considered under Article 8 and the judge was entitled to do so. In such circumstances the decision contains no material error of law.

Decision

10. The decision of the First-tier Tribunal discloses no material error of law and the appeal of the Secretary of State is dismissed.

Anonymity retained.

Signed

Date: 4th July 2016

Deputy Upper Tribunal Judge D N Harris

**TO THE RESPONDENT
FEE AWARD**

No application is made for a fee award and none is made.

Signed

Date: 4th July 2016

Deputy Upper Tribunal Judge D N Harris