Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/16397/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17th June 2016	**On 15th July 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MS NOELYNE MENSAH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms D Aidoo (Litigation Friend)
For the Respondent: Mr K Norton, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Ghana born on 13th November 1988. The Appellant first landed in the United Kingdom on 24th April 2013 in possession of a visa conferring leave to enter until 30th August 2014

subject to a condition prohibiting employment and recourse to public funds. On 12th August 2014 the Appellant made a combined application for leave to remain as a Tier 4 (General) Student Migrant under the points-based system and for a biometric residence permit. That application was considered by the Secretary of State and was refused by Notice of Refusal dated 21st April 2015 on the basis that the Secretary of State was not satisfied that the documents provided demonstrated that the Appellant was in possession of the required level of funds.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Clarke sitting at Hatton Cross on 3rd November 2015. That appeal was dealt with on the papers and in a decision and reasons promulgated on 9th December 2015 the Appellant's appeal was allowed under the Immigration Rules.

3. On 15th December 2015 the Secretary of State lodged Grounds of Appeal to the Upper Tribunal. The grounds were straightforward. They contended that the Immigration Judge had materially erred in law by allowing the Appellant's appeal when the Appellant had left the UK voluntarily on 21st September 2015. Therefore following Section 104(4) of the Nationality, Immigration and Asylum Act 2002 the Appellant's appeal should the grounds argue be treated as abandoned. As the Appellant had departed the UK prior to the appeal being heard, the Appellant abandoned her appeal and therefore there was no jurisdiction to hear the appeal and the Secretary of State's request was that the decision of the First-tier Tribunal be set aside or struck out for lack of jurisdiction.

4. On 13th May 2016 Judge of the First-tier Tribunal P J M Hollingworth granted permission to appeal. No Rule 24 response has been filed or served by the Appellant.

5. It is on that 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. This is an appeal by the Secretary of State. For the purpose of continuity throughout the appeal process Ms Mensah is referred to herein as the Appellant and the Secretary of State as the Respondent. The Appellant appears by her litigation friend Ms Aidoo. I explained fully the process that was taking place before the Upper Tribunal to Ms Aidoo and indicated to her that I would listen to any submissions that she had to make. She noted and understood what was taking place and indicated that she would briefly address me accordingly. The Secretary of State appeared by her Home Office Presenting Officer Mr Norton.

Submissions/Discussions

6. Ms Aidoo indicates that she appreciates what is being said in that the issue before me is one of law and indicates that the Appellant went back to Ghana having been told of the death of her brother last September. She believes that Ms Mensah would like to return to the UK and she had

received the notice that her appeal had been successful. She indicates that she is very much in the hands of the court.

7. Mr Norton relies on the Grounds of Appeal. He indicates this is purely a matter of law and that the Secretary of State does not challenge the favourable findings by the judge. He further indicates in a most helpful concession that he does not object to the decision herein being attached to any subsequent application that the Appellant may make.

The Law

8. 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.

9. 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

10. Whilst the issue in this matter is straightforward, tracing the law is not. The issue is very simply one that because the Appellant had left the UK there was no jurisdiction for the First-tier Tribunal to hear her appeal. The Secretary of State relies on Section 104(4) of the Nationality, Immigration and Asylum Act 2002. That Section states:

> *"An appeal under Section 82(1) brought by a person while he is in the United Kingdom shall be treated as abandoned if the Appellant leaves the United Kingdom".*

11. Consequently whilst on the face of it that would appear straightforward, the matter is complicated by the abolition of Section 82(1) of the 2002 Act. The relevant Section is to be found in paragraph 8(2) of Statutory

Instrument 371 of 2015 which goes under the title of the Immigration Act 2014 (Commencement No. 4, Transitional and Savings Provisions and Amendment) Order 2015. That Section states:

> *"9 – (1) Notwithstanding the commencement of the relevant provisions the saved provisions continue to have effect and the relevant provisions do not have an effect so far as they relate to the following decisions of the Secretary of State –*
>
> *(a) a decision made on or after 6th April 2015 to refuse an application to vary leave to enter or remain made before 20th October 2014 where the person was seeking leave to remain as a Tier 4 Migrant or as the family member of a Tier 4 Migrant and where the result of that decision is that the applicant has no leave to enter or remain".*

12. The application was made on 12th August 2014, i.e. before 20th October 2014. The decision was made on 21st April 2015, i.e. a date after 6th April 2015. Consequently the previous provisions of Section 104(4) of the 2002 Act are preserved and there was no jurisdiction for the First-tier Tribunal Judge to hear the appeal. In such circumstances that clearly is a material error of law and the decision of the First-tier Tribunal Judge is set aside and is substituted with a decision that the Notice of Refusal stands on the basis that there was no jurisdiction to hear an appeal to the First-tier Tribunal.

Direction

13. It is recorded, with the full consent of the representative of the Secretary of State, that the positive findings regarding the Appellant's application as a Tier 4 Migrant are not challenged by the Secretary of State. Further, the basis upon which this matter came before the Upper Tribunal is, it is accepted through no fault of the Appellant. Her appeal was dealt with on the papers and she had left the UK and assumed that nothing further would happen. The fact however remains that her appeal was allowed. The reason that her appeal now must fail is simply because there was no jurisdiction to hear the appeal in the first place. The reason for which the Appellant has returned to Ghana is not a matter of controversy and is not in any way to represent a taint on the Appellant's character or immigration history. With the full co-operation of the Secretary of State I direct that in the event that the Appellant seeks to make a further application to return to the UK, presumably as a Tier 4 Student, then the court directs that there is no objection to her attaching a copy of this decision to that application.

Administrative Direction

14. Both the Tribunal and the Secretary of State are advised that the address for contacting the Appellant in the UK is care of Ms D Aidoo, 20 Wise Road,

Stretford, London E15 2TQ, and all documents relating to this appeal should be served on her care of that address.

Notice of Decision

The decision of the First-tier Tribunal contained a material error of law and is set aside. The basis of the material error of law is that the Tribunal had no jurisdiction in which to hear the appeal. As a result the Notice of Refusal of the Secretary of State dated 21st April 2015 is reinstated.
No anonymity direction is made.

Signed Date 15 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 15 July 2016

Deputy Upper Tribunal Judge D N Harris