



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

Appeal Number: DA/00040/2017

**THE IMMIGRATION ACTS**

**Heard at Birmingham Employment Tribunal  
on 1 December 2017**      **Decision & Promulgated  
On 1 December 2017**      **Reasons**

**Before**

**UPPER TRIBUNAL JUDGE HANSON**

**Between**

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

Appellant

**and**

**MILEMBA KAPITA  
(anonymity direction not made)**

Respondent

**Representation:**

For the Appellant: Mrs Aboni Senior Home Office Presenting Officer.  
For the Respondent: Mrs E Norman instructed by JM Wilson Solicitors.

**ERROR OF LAW FINDING AND REASONS**

1. This is an appeal by the Secretary of State against a determination of First-tier Tribunal Judge Mitchell who allowed Miss Kapita's appeal against the decision of the Secretary of State to deport her from the

United Kingdom pursuant to the Immigration (European Economic Area) Regulations 2006.

## **Discussion**

2. Permission to appeal was granted to the Secretary of State on a renewed application on the 29 September 2017 on the basis it was arguable the Judge should have applied the Immigration (European Economic Area) Regulations 2016 rather than the 2006 version, and that the Judge had erred in the analysis that Miss Kapita, a Belgium national, had a right of permanent residence in the UK.
3. Miss Norman did not seek to argue that the finding by the Judge that Miss Kapita had acquired a right of permanent residence is infected by legal error. The Judge clearly made findings in relation to the way in which it was said Miss Kapita was exercising treaty rights which are legally incorrect. The key element being the finding that because she was studying she was a qualified person whereas the requirement for exercising treaty rights as a student includes a need to prove additional elements such as the existence of comprehensive sickness insurance which the Judge fails to mention or make findings upon.
4. The issue in the appeal is the materiality of this error. It had always been Miss Kapita's case that this was a one-off incident which led to her conviction and that she did not pose a serious threat to anybody in the United Kingdom. At [74] of the decision under challenge the Judge finds "*There is no basis to conclude that the appellant is likely to reoffend and commit further serious offences in the future*".
5. The Secretary of State's representative responsible for drafting the grounds of challenge makes no reference to this important finding and permission was not granted to enable Mrs Aboni to do so by the Upper Tribunal Judge who granted permission. It is an important finding for unlike deportation under domestic provisions, where the offence leading to the decision to deport can in itself form the reason for removing a person from the United Kingdom, under the EEA Regulations there is a requirement to establish that a person represents a sufficient and serious threat such that interference with a right of free movement is warranted.
6. The key question relating to materiality is therefore whether the finding Miss Kapita did not represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society is within the range of findings reasonably open to the Judge on the evidence.
7. The Judge finds at [56]:
  56. The Secretary of Status argued that the appellant is a medium risk of offending and a medium risk to the community. Having considered the evidence and the submissions made on this point, I conclude that the assessment made by the Secretary of State is not sustainable. The offending manager has had the opportunity to assess the appellant and has made a judgement in the OASYS report which appears to be both sound and unchallengeable on the facts before this tribunal. I therefore conclude that the risk of the appellant offending in the future is low and there is a low risk to the public. The appellant has not committed any

offences in the past which warranted a custodial sentence. There appears to be no real prospect of her reoffending in the future.

8. This is a finding reasonably open to the Judge following a careful consideration of the evidence and it has not been established that in finding Miss Kapita posed a low risk of offending with no real prospects of her reoffending in the future the Judge has erred in law in a material manner.
9. As the unchallenged finding is that Miss Kapita does not present a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society finding her appeal should be allowed was within the range of reasonable conclusions open to the Judge on the evidence.
10. Accordingly, I find the Secretary of State has failed to establish any arguable legal error material to the decision to allow the appeal that warrants the Upper Tribunal interfering with this decision.

### **Decision**

11. **There is no material error of law in the First-tier Judge's decision. The decision shall stand.**

Anonymity.

12. 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 pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....  
Judge of the Upper Tribunal Hanson

Dated the 1 December 2017