



UPPER TRIBUNAL  
(IMMIGRATION AND ASYLUM  
APPEAL NUMBER: HU/10158/2017

CHAMBER)

**THE IMMIGRATION ACTS**

Heard at: Field House  
On: 4 September 2018

Decision and Reasons Promulgated  
On: 25 September 2018

Before

Deputy Upper Tribunal Judge Mailer

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

**Appellant**

And

MRS CINDY MENDES DE SOUZA  
ANONYMITY DIRECTION NOT MADE

**Respondent**

**Representation**

For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer

For the Respondent: In person

**DECISION AND REASONS**

1. I shall refer to the appellant as the secretary of state and to the respondent as “the claimant.” The claimant appeared in person. I explained the nature of the proceedings to her at the outset.
2. The secretary of state appeals with permission against the decision of the First-tier Tribunal Judge promulgated on 2 April 2018, allowing the claimant's appeal to the extent that the secretary of state had failed to exercise her discretion, the effect of which was to vitiate the entirety of the decision. The appeal was decided on the papers. She found that the decision of the secretary of state is not in accordance with the law and the applicable immigration rules. Further, the reasons given by the secretary of state did not justify the refusal of entry clearance.
3. She stated at paragraph 2 of the decision: “Appeal allowed”.

4. In the grounds seeking permission, the secretary of state contended that the determination was “hopelessly confused<sup>1</sup>” [14]. The Judge found that the appeal failed under the Immigration Rules. At [17] it was found that for reasons which are unclear, the appeal is allowed to the limited extent that the appellant is to send original documents to the Home Office in order for proper checks to be undertaken. Then at [20], the Judge appears to allow the appeal generally.
5. It is asserted that the appeal however was on human rights grounds only. The Judge engaged in no consideration of that issue.
6. On 9 July 2018, First-tier Tribunal Judge Birrell granted the secretary of state permission to appeal. She noted that the right of appeal in this case was on human rights grounds only and the claimant's ability to meet the rules was clearly relevant to the issue of proportionality under Article 8. Given that there is no longer any power to allow an appeal “to a limited extent” as the Judge purports to have done, the Judge failed properly to engage with the rights of appeal that the claimant has in respect of Article 8.
7. She found that there are a number of arguable errors of law.
8. At the hearing before the Upper Tribunal, I explained to the claimant the secretary of state's ground of appeal. I had earlier provided her with a bundle of the core documents, including the decision and the permission to grant the appeal. She confirmed that she had read the documents.
9. Mr Whitwell on behalf of the secretary of state simply relied on the grounds of appeal. He contended that there had been no proper engagement with the appeal, which was limited to human rights grounds only.
10. The claimant stated that she did not wish to say anything.

### **Assessment**

11. I find that the appeal in this case was on human rights grounds only. Accordingly, the ability of the claimant to meet the Rules was relevant to the issue of proportionality under Article 8, which was not considered.
12. As noted, there is no longer any power to allow an appeal to a limited extent as the Judge has purported to do in this case. She did not properly engage with the right of appeal which the claimant in fact has under Article 8.
13. In the circumstances, I find that the decision of the Judge involved the making of an error on a point of law.
14. The decision is accordingly set aside. Mr Whitwell submitted that this is a proper case for the decision to be re-made by the First-tier Tribunal.
15. I am satisfied that the extent of judicial fact finding that is necessary in order for the decision to be re-made is fairly extensive. There will be a complete re-hearing with no findings preserved.

### **Notice of Decision**

---

<sup>1</sup> That is a wholly unnecessary and gratuitously offensive assertion in the circumstances and adds nothing to the strength or otherwise of the ground.

The decision of the First-tier Tribunal involved the making of an error on a point of law and is set aside. The appeal is remitted to the First-tier Tribunal (Hatton Cross) for a fresh decision to be made by another Judge.

Anonymity direction not made.

Deputy Upper Tribunal Judge Mailer

Signed Dated: 20 September 2018