



IAC-AH-KRL-V1

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

Appeal Number: IA/33983/2014

THE IMMIGRATION ACTS

Heard at City Centre Tower, Birmingham

On 10th March 2016

**Decision & Reasons
Promulgated
On 15th April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE RENTON

Between

**SEDIN SAHMAN
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms R Manning, instructed by Hasan Solicitors

For the Respondent: Mr D Mills, Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The Appellant is a male citizen of Bosnia and Herzegovina, born on 7th March 1982. The Appellant first arrived in the United Kingdom on 7th December 2002 when he was given leave to enter as a student until 31st

October 2006. That leave was subsequently extended until 31st August 2007. However, on 10th July 2007 the Appellant returned to Bosnia and Herzegovina, returning to the UK on 12th August 2007 when he was given leave to enter as a Minister of Religion until 23rd July 2009. Later the Appellant applied unsuccessfully for leave to remain in that capacity, and left the UK on 11th February 2010. Thereafter the Appellant made an unsuccessful application for leave to enter as a Tier 4 (General) Student, but then the Appellant was granted leave to enter in that capacity until 30th January 2012 which was subsequently extended until 26th March 2014. On 24th March 2014 the Appellant applied for indefinite leave to remain on the basis of ten years' continuous lawful residence. That application was refused for the reasons given in the Respondent's letter of 8th August 2014. The Appellant appealed, and his appeal was heard by Judge of the First-tier Tribunal Broe sitting at Birmingham on 26th November 2014. He allowed the appeal under the Immigration Rules for the reasons given in his Decision dated 11th December 2014. The Respondent sought leave to appeal that decision, and on 16th February 2015 such permission was granted.

Error of Law

2. I must first decide if the decision of the Judge contained an error on a point of law so that it should be set aside.
3. The Judge found that the Appellant did not succeed under the provisions of paragraph 276A of the Statement of Changes in Immigration Rules HC 395 because his residence in the UK had not been continuous. This was a matter not in dispute before him at the hearing. However, the Judge decided to allow the appeal because he decided that the Respondent had not exercised properly her residual discretion and had not followed her own Policy Guidance whereby the Respondent's discretion should be exercised in favour of the Appellant where there were, inter alia, particularly difficult family circumstances. In this case, both the Appellant's grandparents had died during the Appellant's return to Bosnia and the Judge was satisfied that such amounted to a particularly difficult family circumstance.
4. At the hearing, Mr Mills argued that the Judge had erred in law in coming to that conclusion. Following the decision in **Marghia (procedural fairness) [2014] UKUT 00366 (IAC)**, the Tribunal should only have interfered with the Respondent's exercise of her discretion if it had fallen foul of the **Wednesbury** test. The Judge had made no decision in this respect, but instead had found that there was a difficult family circumstance pertaining to the Appellant for which he had given inadequate reasoning. If the Judge had been right to make such a finding, his decision should have been that the decision of the Respondent was not in accordance with the law for failing to follow her own Policy Guidance. The Judge should have remitted the case to the Secretary of State for her to consider again the exercise of her discretion. Instead, he had allowed the appeal under the Immigration Rules which was an error of law. In

addition, the Judge had not considered at all the Appellant's rights under Article 8, ECHR.

5. In response, Ms Manning referred to her Rule 24 response and said it was apparent that the Judge had allowed the appeal because he had found the Respondent's refusal decision not to be in accordance with the law. He was satisfied that the Secretary of State had not considered her own Policy Guidance properly. The Judge had given adequate reasons for finding that the Secretary of State had not considered her own Policy sufficiently, being the death of the Appellant's grandparents and his own ill-health.
6. I find a number of errors of law in the decision of the Judge which I therefore set aside. Quite apart from the issue of whether the Judge had given sufficient reasons for his finding that there were particularly difficult family circumstances, in the Decision under the heading Notice of Decision the Judge wrote:

"The appeal is allowed under the Immigration Rules."

This is despite the Judge writing at paragraph 18 of the decision that the Appellant's "application could not meet the requirement of the Rules" and writing further at paragraph 21 of the Decision:

"Therefore the Respondent's decision is not in accordance with the law and the applicable Immigration Rules."

These contradictions amount to an error of law. Further, if it was the case that the Judge allowed the appeal because he found the original decision of the Respondent to be not in accordance with the law, that decision was not made in accordance with the requirements of **Marghia** which are not referred to at all.

7. Having announced my decision at the hearing, I acceded to the request of the parties to return the appeal to the First-tier Tribunal to remake the decision in the appeal. This was because the Judge had made no decision about the Appellant's Article 8, ECHR rights, an error of law in itself because those rights were argued before the Judge as he recorded at paragraph 17 of the Decision. The appeal is returned to the First-tier Tribunal in accordance with the provisions of paragraph 7.2(a) of the Practice Statements.

Notice of Decision

8. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside that decision.

The decision is to be remade in the First-tier Tribunal.

Anonymity

The First-tier Tribunal did not make an order for anonymity and I find no reason to do so.

Signed

Dated

Deputy Upper Tribunal Judge Renton