Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/09911/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 February 2015	**On 24 February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE APPLEYARD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

MS NATTALIA BENITES DE MORAES
(ANONYMITY DIRECTION NOT MADE)
and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms L Kenny, Home Office Presenting Officer
For the Respondent: Mr A Chakmakjian

DECISION AND REASONS

1. The appellant in this case is the Secretary of State for the Home Department. However, for the sake of clarity, I shall use the titles by which the parties were known before the First-tier Tribunal, with the Secretary of State referred to as "the respondent" and Ms De Moraes as "the appellant".

2. No anonymity order has been made in these proceedings and there is no reason why such an order should now be made.

3. The appellant is a citizen of Brazil who was born on 24 June 1995. Her mother is a Brazilian citizen present in the United Kingdom with limited leave to remain as the spouse of a British citizen. The appellant was granted entry clearance to join her mother in the United Kingdom on 10 August 2012. She made an application for leave to remain on 7 January 2014 without the benefit of legal assistance which was refused on 4 February 2014 because the respondent was not satisfied that "discretion should be exercised outside the Immigration Rules". The appellant appealed that decision and following a hearing at Hatton Cross Judge of the First-tier Tribunal Napthine, in a decision promulgated on 23 October 2014 allowed the appellant's appeal to the limited extent that the refusal was wrong in law and the appellant awaits a lawful decision.

4. The respondent sought permission to appeal and on 11 December 2014 Judge of the First-tier Tribunal Lever granted such permission in the following terms:-

> "1. The Respondent seeks permission to appeal, in time, against a decision of the First-tier Tribunal (Judge Napthine) who, in a determination promulgated on 23 Oct 2014 - allowed the Appellant's appeal to remain outside the rules.
>
> 2. The grounds assert that the judge allowed the appeal within the Immigration Rules without specifying which rule applied and on an application made outside of the rules.
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> 3. The Appellants mother had limited leave to remain in the UK. The Appellant had entered the UK in 2012 as a dependant child. However prior to the Appellants application she had become an adult.
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> 4. The grounds of appeal do not reflect the judges conclusion. He did not allow the appeal under the Immigration Rules rather he allowed the appeal to the extent of finding the Respondent had not yet made a lawful decision. It is arguable that the Respondent had made a lawful decision and it was incumbent upon the judge to have dealt with the matter on appeal in light of the evidence available to him either within or outside of the rules.
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> 5. There was an arguable error of law in this case."

5. Today Ms Kenny relied on the respondent's grounds seeking permission to appeal contending that the judge had made a material misdirection of law in finding that the appeal should have been allowed with reference to the Immigration Rules as the decision was not in accordance with them noting, as she did that the respondent's refusal was in fact outside of the Immigration Rules as the appellant was over the age of 18 at the time of application. Mr Chakmakjian made two key points. Firstly, that the grounds were not arguable as the respondent has not asserted within

them that the decision is in accordance with the law (as opposed to the Immigration Rules). He relied on the fourth of Judge Lever's reasons for granting permission with particular reference to the fact that the grounds of appeal do not reflect the judge's conclusions. Secondly, he contended that the respondent has clearly failed to consider the application in light of the very purpose for which it was made. In short that there had been no balancing exercise and consideration of Article 8. He relied on the authority of **R (on the application of Aliyu and another) [2014] EWHC 3919 (Admin)**.

6. Whilst Ms Kenny argued that I should set the judge's decision aside and make a fresh one dismissing the appeal Mr Chakmakjian argued that if I was not with the first of his submissions the second one was that effectively there could be no replacement for a properly effected balancing exercise within Article 8 and the only result open to the First-tier Tribunal Judge was the one she in fact came to.

7. I find, and if I need to I extend the reasons granting permission to appeal to cover the respondent's grounds, that there is here no material error of law. I accept the submission that there was very little open to the First-tier Tribunal Judge to do beyond allowing the appeal in the way that she did. The respondent's refusal letter contains no Article 8 balancing exercise and simply re-states the Secretary of State's policy to consider granting leave outside the Immigration Rules where particularly compelling circumstances exists. Further, that such grounds are rare and are given only on genuinely compassionate grounds. Having considered the circumstances of this particular appellant there are no exceptional circumstances.

8. It was incumbent upon the respondent to carry out an Article 8 balancing exercise. She plainly has not done so. The appellant was entitled to consideration of her individual circumstances outside the Immigration Rules pursuant to Article 8.

9. Accordingly I find that the judge has not materially erred as asserted by the respondent.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision.

No anonymity direction is made.

Signed Date 23 February 2015.

Deputy Upper Tribunal Judge Appleyard