Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/25482/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 21 November 2014	**On 24 November 2014**

Before

Deputy Upper Tribunal Judge Pickup

Between

Ruth Gzifa Afi Nutsu
[No anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the appellant: Mr S Subrarayan, instructed by Sivaramen
For the respondent: Mr S Kandola, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Ruth Gzifa Afi Nutsu, date of birth 1.4.89, is a citizen of Ghana.

2. This is her appeal against the determination of First-tier Tribunal Judge Pacey promulgated 7.8.14, dismissing her appeal against the decision of the respondent, dated 8.7.13, to refuse to grant leave to remain in the UK. The Judge heard the

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appeal on 29.7.14.

3. First-tier Tribunal Judge Levin granted permission to appeal on 10.10.14.

4. Thus the matter came before me on 21.11.14 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Pacey should be set aside.
6. In granting permission to appeal, Judge Levin found merit in the grounds that the judge erred in "failing to consider and by failing to make any finding upon whether the child Mercedes normally lived with the appellant and whether the eligibility requirements of Section E-LTRPT2.3 of Appendix FM were met by reason thereof."
7. More significant, however, is that given that the decision of the Secretary of State did not contain any removal directions and was a decision not to grant leave to remain, as opposed to a refusal to vary leave to remain, there was no right of appeal against the decision and thus the Tribunal had no jurisdiction to consider the appeal at all.
8. At the time of her application on 9.3.12, the appellant had an EEA Residence Card. This explains why there was no removal directions in the decision of 8.7.13, although it appears that the residence card expired on 22.5.12 and was not renewed, for reasons that have not been explained to me. However, the fact remains that as the application was for something which the appellant did not have, leave to remain under the Immigration Rules, the decision did not remove anything from her and did not even require her to leave the UK. The decision merely refused to grant that which she sought. I rejected the submissions of Mr Subrarayan that the decision removed her right to remain in the UK. The decision could not take away that which she did not have, except under the Immigration (EEA) Regulations 2006, as amended. There has been no application and thus no decision under those Regulations. In TB (EEA national: leave to remain) Nigeria [2007] UKAIT 00020, the Tribunal held that a resident permit granted under the EEA Regulations is not Leave to Enter or Leave to Remain. A person who has a Residence Permit does not, therefore, meet any requirements of the Immigration Rules that he have Leave to Enter or Leave to Remain.
9. Mr Kandola explained that in due course a removal decision would now be made, which would in due course entitle the appellant to an appeal. However, it is clear that a decision to

refuse to grant leave to remain is not one of the decisions listed under section 82 of the 2002 Act and defined as an “immigration decision,” which gives rise to a right of appeal.

10. In Virk v Secretary of State for the Home Department [2013] EWCA Civ 652 it was held that although the Secretary of State had failed to raise before the First-tier Tribunal the issue of that Tribunal's jurisdiction to entertain a family's application for leave to remain, the Upper Tribunal was entitled to dismiss the family's subsequent appeal against the First-tier Tribunal's decision on the basis that the First-tier Tribunal had not had jurisdiction, notwithstanding that the point had not been raised below. In the present case, the Secretary of State had not complied with directions requiring her to clarify the basis for the statement in the refusal decision that there was no right of appeal. However, in R (on the application of Nirula) v FTT (IAC) and SSHD [2012] EWCA Civ 1436 the Court of Appeal said that the Tribunal was entitled to take a point on its jurisdiction of its own motion.
11. It follows that there was no right of appeal against the decision of the Secretary of State and therefore the decision cannot stand.

Conclusion & Decision:

12. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I re-make the decision by finding that there was no valid appeal before the First-tier Tribunal and thus no appeal that could be decided. The First-tier Tribunal did not have jurisdiction to consider the merits of the appellant’s claim.

Signed: Date: 21 November 2014

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award Note: this is not part of the determination.

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: There is no valid appeal and thus there can be no fee award.

Signed: Date: 21 November 2014

Deputy Upper Tribunal Judge Pickup