**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/37059/2013

**THE IMMIGRATION ACTS**

| **Heard at Birmingham** | **Determination Promulgated** |
|---|---|
| **on 2nd May 2014** | **On 02nd June 2014** |

**Before**

**UPPER TRIBUNAL JUDGE HANSON**

**Between**

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

Appellant

**and**

**STEPHANIE LEMIEUX**
**(Anonymity direction not made)**

Respondent

**Representation:**
For the Appellant: Mr Smart – Senior Home Office Presenting Officer.
For the Respondent: her sponsor Mr Lamb.

**DETERMINATION AND REASONS**

1. This is an appeal by the Secretary of State against a determination of First-tier Tribunal Judge Ghani promulgated on 17 January 2014 in which he allowed the appeal under the Immigration Rules against the decision of the Secretary of State dated 23 September 2013 to refuse to grant leave to enter under paragraph 43 of the Rules.

2. Ms Lemieux is a Canadian national who was born on the 20 January 1978. She sought leave to enter the United Kingdom as a family visitor for a period of one to two years to join her partner, Mr Lamb, whilst waiting for the Canadian authorities to approve his application for residency in Canada.

3. Ms Lemieux and Mr Lamb met in New Zealand in 2004. They have maintained their relationship and on 26 November 2010 had their first child. Their second child was born on 26 June 2013. A conscious decision was made to relocate to Canada as a family and so they sold their business in New Zealand. Whilst awaiting authorisation from the Canadian authorities they travelled to the United Kingdom to spend time with Mr Lamb's parents.

4. The notice of refusal of leave to enter contains the following:

> " You have asked for leave to enter the United Kingdom as a family visitor for one to two years to join your partner Anthony McKenzie Lamb (GBR) whilst your await the Canadian authorities to approve his application for residency in Canada. You have sought admission for a period in excess of six months. As a Canadian national you are required to hold entry clearance for a period of six months or more and you have no entry clearance. I therefore refuse leave under paragraph 43 (1a) of HC 395."

5. Removal directions were set in the same document to remove Ms Lemieux and the children, who had been refused permission in line, to Montréal. The Judge checked in the hearing whether there were separate appeals by the children but the only appeal before the First-tier Tribunal was that lodged by their mother. In the children's removal notices it is stated that they are New Zealand nationals.

6. A limited right of appeal was granted on the basis the decision was taken on the grounds Ms Lemieux did not have an entry clearance valid for the purpose for which her application for leave to enter was made.

7. An appeal was lodged challenging the factual basis on which is stated Ms Lemieux was alleged to have sought entry clearance for the period stated, and raising human rights issues. On 28 September 2013 the Home Office wrote to her solicitors certifying the human rights claim as being clearly unfounded under section 94 of the 2002 Act, the effect of which is that Ms Lemieux is only able to exercise a right of appeal once she has left the UK against this decision.

8. Having considered the evidence the Judge made a number of findings which can be summarised as follows:

    i. Although it was claimed that the two children were also appellants there was only one appeal pending which was that of the appellant herself [8].

    ii. Under rule 16 (1) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 , if the Secretary of State or an immigration officer issues a certificate under section 97 or 98 of the 2002 Act which relates to a pending appeal, he must file a notice of the

certification on the Tribunal. The Judge noted from the documentation that the notice of appeal is dated 27 September 2013 whereas the letter certifying the claim is 28 September 2013. As this post dates the notice of appeal the Judge found he was unable to hear the substantive appeal [9].

iii. The appellant is a Canadian national and does not require a visa prior to entry to the UK providing she does not intend to remain here for more than six months. Material on the Secretary of State's website regarding long-term visas valid for one to five years states that if a long-term visa is granted an applicant is allowed unlimited entry to the UK at the time the visa is valid, but for a maximum of six months on each visit. The appellant genuinely believed she could apply for a period of up to 2 years. Correspondence received from Mr Lamb and his parents made it difficult to conclude that the appellant's intention in her own right was to remain for two years. The letters from third parties reflected their desire. There had to be distinction between wish and intention. The appellant said she told the immigration officer that if she is granted six months and that is all she is allowed that would be "okay". The record of interview has not been produced and the benefit of the doubt is given to the appellant on the basis there was a genuine misunderstanding of the information relating to family visitors and immigration officers should therefore have exercised discretion in the appellant's favour and granted six months leave on arrival at the airport [11].

9. The Secretary of State sought permission to appeal alleging the Judge had no jurisdiction to hear the appeal as Ms Lemieux did not have an in country right of appeal on the ground that the decision was not in accordance with the immigration rules. It is also alleged the judge erred in finding he could hear the appeal substantively on the basis of the certification.

**Preliminary issue**

10. A preliminary issue arose relating to whether the Secretary of State's application was in time or not. Permission had been granted by First-tier Tribunal Judge Ransley but it is not clear from the decision whether the time point was taken and, if the application is out of time, such a grant can only operate as a conditional grant.

11. The Secretary of State's application of permission to appeal omitted the portion of the form providing an explanation for why the application was one day late. Mr Smart accepted that receipt was governed by the procedure rules and that having received the determination the Secretary of State did all she could to process it efficiently, but it was not faxed to the Tribunal until 28 January 2014

whereas it should have been sent on the 27th. Mr Lamb opposed any extension claiming that the Secretary of State had had sufficient time and that it would be unfair to extend time now, especially in light of a further intervening event in that Ms Lemieux left the United Kingdom voluntarily to return to Canada.

12. I considered the explanation for the delay and Mr Lamb's objection and have followed the guidance provided in BO (Nigeria) when considering applications of this nature. I find in all the circumstances, including the overriding objectives, the interests of justice, and fairness, that it is appropriate in all the circumstances to extend the time in which the Secretary of State may file her challenge the First-tier Tribunal decision.

**Error of law finding**

13. I find the Judge has erred in law in a manner material to his decision to allow the appeal and now give my reasons.

14. Although the Judge cannot be faulted for giving Ms Lemieux the benefit of the doubt in the absence of the record of interview I have now seen that document, which is admitted, and which shows that she clearly stated to the Immigration Officer that she wished to remain in the United Kingdom for a period of one to two years. This is the period it was believed it would take the Canadian authorities to process Mr Lamb's application to enable the family to settle there.

15. The notice of refusal of leave to enter specifically states that any right of appeal was limited under section 88 of the 20002 Act because the decision was taken on the basis Ms Lemieux did not have entry clearance valid for the purpose for which her application for leave to enter was made. Section 88 specifically prevents a person appealing under section 82 (1) against an immigration decision taken on the grounds that he or she is seeking to be in the United Kingdom for a period greater than that permitted in his or her case by the Immigration Rules (88 (2) (c)) or is seeking to enter or remain for a purpose other than one for which entry is permitted in accordance with the Rules (88 (2) (d)). Whilst subsection 2 does not prevent an appeal being bought on any of the grounds referred to in section 84 (1) (b) (c) and (g), which includes an appeal on human rights grounds, this element was certified by the decision maker as being 'clearly unfounded' under section 94 of the 2002 Act.

16. There was no challenge to the decision by way of judicial review and I find that section 88 specifically prevented the Judge from considering the merits of the appeal under the Rules and that in doing so he made a material misdirection of law.

17. In relation to the human rights appeal, the Judge refers to rule 16 of the 2005 Procedure Rules but that is not correct as this rule relates to claims certified under section 97 and 98 of the 2002 Act whereas Ms Lemieux's human rights

claim is certified under section 94. This is a 'clearly unfounded' certification not a certification on grounds of national security or other grounds of public good. There was no challenge to the certification by way of judicial review and the effect of such certification is that any right of appeal has to be exercised out of country.

18. The error in relation to the certification is, however, not material as the judge concluded that he was unable to hear the substantive appeal which is legally correct for at that time Ms Lemieux was still in the United Kingdom.

19. I set aside the decision of Judge Ghani. Only the findings regarding the family relationship and immigration history shall be preserved.

**Discussion**

20. In moving on to remake the decision it is necessary to consider a further material development, namely the fact Ms Lemieux has now left the United Kingdom and returned to Canada. If she had a valid in country right of appeal this would be lost as a result of the effects of section 104 (4) on the grounds of statutory abandonment, but she does not. There was some discussion regarding the consequences of her leaving in respect of this appeal which relates to the appeal before the First-tier Tribunal.

21. In relation to the in country appeal lodged, which is the appeal that is being reconsidered and in respect of which the decision is being remade, this was filed when Ms Lemieux was still in the United Kingdom. Accordingly I find that the appeal must be dismissed for want of jurisdiction on the grounds that section 88 prevents an appeal against the substantive decision under the Rules and because the human rights claim has been certified under section 94 only providing her with a right of appeal exercisable 'out of country'.

22. As Ms Lemieux has left the United Kingdom it is open to her to lodge such an appeal, if she wishes to still pursue this avenue against the refusal of her claim on human rights grounds although she may need to make an application for permission to appeal to be admitted out of time. In such an event the fact she is a litigant in person who has acted without evidence of malice or an attempt to circumvent the immigration rules for fraudulent purposes and to have pursued an appeal which lacked jurisdiction as a result of a lack of understanding of the relevant law may be issues that need to be drawn to the attention of the tribunal in the section of the application which allows an individual to explain why they are seeking permission to appeal out of time.

23. In relation to the children, they are said to be New Zealand nationals although they have been born to a British national father. It may be open to them to apply for British nationality or, possibly joint British/Canadian nationality if this is what their parents wish. I make this comment as an observation and no

more without having researched in any depth the nationality law relating to Canada and the UK and whether such dual nationality is permitted. If the children have British citizenship there can be no requirement for entry clearance to the United Kingdom so far as they are concerned. If this avenue is to be pursued it may be advisable for proper legal advice to be taken.

**Decision**

24. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. There is nothing extant before the Upper Tribunal for want of jurisdiction.**

Anonymity.

25. 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.

Fee Award.

Note: this is **not** part of the determination.

26. In light of my decision to re-make the decision in the appeal by finding there is not jurisdiction to consider the appeal, 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 as Ms Lemieux never had an in country right of appeal.

Signed…….
Upper Tribunal Judge Hanson

Dated the 30th May 2014