Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/44480/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Decisions and Reasons Promulgated**
26 June 2015	**27 July 2015**

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE DEANS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BELINDA KIERAN-EJIMADU

Respondent

Representation:

For the Appellant: Ms R Petterson, Senior Home Office Presenting Officer.
For the Respondent: Mr J Bryce, Advocate instructed by Latta & Co Solicitors.

DETERMINATION AND REASONS

1. This is a simple case that has been drawn by carelessness into a rather bizarre procedural history. The respondent (whom we shall call the claimant) is a national of Nigeria, born in 1971. She has been in the United Kingdom since 2005. Whilst she was here with student leave her husband arrived, apparently as a visitor, accompanied by the claimant's eldest

child. That was in February 2005. Two further children were subsequently born in the United Kingdom. The entire family is, so far as we are aware, of Nigerian nationality only. The claimant's husband's leave expired in 2006. The claimant's leave expired in January 2007. The Secretary of State has been aware of the family's continued unlawful presence in the United Kingdom since 2011 at least, when an application for leave to remain was made.

2. The claimant's application of 2011 was refused. There was no right of appeal against that decision, but a judicial review claim was settled on the basis that the Secretary of State would reconsider, and make a new decision which, if adverse, would carry a right of appeal. The new decision was made on 13 June 2015. The claimant exercised her right of appeal, and her appeal was heard by Judge Morrison in the First-tier Tribunal on 6 February 2014. The grounds of appeal before him were copious. He rejected a number of them. He did, however, allow the appeal. He did so on the basis of arguments put to him in relation to article 8, particularly insofar as it affected the claimant's children, and a precise argument based on paragraph 276 ADE of the Statement of Changes in Immigration Rules, HC 395 (as amended). Judge Morrison was persuaded in relation to three propositions, which are as follows:

> "1. The children's position should be considered under paragraph 276 ADE as it stood at the date of the claimant's [which is perhaps correctly described as the family's] application, on 23 December 2011.
>
> 2. Applying that paragraph, as it then stood, to the claimant's two elder children would have shown that they merited a grant of indefinite leave to remain.
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> 3. In those circumstances the claimant could derive a right to indefinite leave to remain on the analogy of derived rights for the carers of EEA national children."

3. Having so concluded, the judge allowed the appeal under the immigration rules and on the basis of article 8. The Secretary of State sought and was granted permission to appeal in relation to the conclusion under the immigration rules. The judge's conclusion in relation to proposition 1 has not been disputed. The Secretary of State's grounds of appeal related to proposition 3, and evidently have considerable merit.

4. There was then a hearing before Upper Tribunal Judge Dawson. At that hearing the Secretary of State sought to enlarge her grounds to include a challenge to the judge's conclusion on proposition 2. We do not know precisely the terms of the application: it may have included argument about the correctness of proposition 1. Judge Dawson refused to allow the Secretary of State to amend her grounds in that way, because "the grounds of application were clearly on the basis that there was no desire to disturb the finding under paragraph 276 ADE but instead the focus was on the consequences". He did not determine the appeal: instead, he gave directions for the Secretary of State to provide a skeleton argument on the one issue which had always been live.

5. The continuance of the appeal in that way, however, presented two major difficulties, as recognised by both parties before us. The first is that proposition 2 is clearly and simply wrong. We do not know how it came to happen, but neither of the judges, and neither of the parties, appears to have looked at the wording of the relevant paragraph. The issue is whether the children are entitled to indefinite leave to remain on the basis of seven years presence in the United Kingdom. The paragraph has, however, always required that the seven years be completed before the date of the application. There is no conceivable doubt that that requirement could not be met in the present case. The judge's conclusion, and everything that followed from it, was wrong. Judge Dawson's failure to appreciate that would have required us to deal with the matter on an evidently wrong basis.

6. There is a second issue. As we have said, the Secretary of State appealed in relation to the decision under the immigration rules. The appeal was, however, allowed on the basis of article 8 as well. The Secretary of State did not seek permission to appeal that finding. Ms Petterson told us at the hearing that the Secretary of State would not seek to amend the grounds to include an appeal in relation to that finding, because in any event the application of s.117B(6) to the facts of the claimant's case at the date of any new determination by a Tribunal would, realistically, pose considerable problems for her. As all parties before us agreed, nothing else really matters. If the First-tier Tribunal judge erred in his conclusions on the immigration rules, which, for the reasons we have given, we think he must have done, the error is immaterial in the light of his decision in relation to article 8. The judge's decision to allow the claimant's appeal under article 8 stands unappealed. The claimant is entitled to the appropriate grant of leave in those circumstances. The other members of the claimant's family will need to be in contact with the Secretary of State in relation to any appropriate grants to them.

7. For these reasons we decline to set aside the determination of the First-tier Tribunal which stands as a determination allowing the claimant's appeal on human rights grounds.

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 13 July 2015