Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/27654/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 18 July 2014	**On 4 August 2014**

Before

UPPER TRIBUNAL JUDGE JORDAN

Between

ROSE DEMENA MORRIS

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Aminu, Solicitor, Charles Hill & Co. Solicitors
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant was born on 13 April 1951 and she is now 63 years old. She is a national of Jamaica. She had been a regular family visitor to the United Kingdom in the period spanning 1993 to 1998. She had parents

and two children as well as other relations living in the United Kingdom. She was however granted formal leave to remain in the United Kingdom on 14 August 1998 in order to look after her sick daughter and granddaughter who were settled in the United Kingdom. That position was extended until 14 September 2011. That is now almost twelve years ago.

2. She remained without leave in the period 14 September 2002 thereafter. She had no extant leave at the time she made an application on 3 June 2013. That application was on the basis that she had a family or private life in the United Kingdom such that it would be unlawful to remove her. It was in any event an application that was made outside the Immigration Rules on compassionate grounds.

3. The decision that was made by the Secretary of State is seen in our bundle. It is dated 17 June 2013. It is said to be a refusal of grant of leave to remain and then reference is made to the Immigration Rules and in particular the Immigration Rules introduced in July 2012 insofar as they relate to the appellant's human rights. The application was refused because the requirements of the Rules were not met.

4. The substance of the decision was set out in these terms.

> "Having spent 47 years in your home country and in the absence of any evidence to the contrary it is not accepted that in the period of time that you have been in the United Kingdom you have lost ties to your home country and therefore the Secretary of State is not satisfied that you can meet the requirements of Rule 276ADE(vi)."

5. The Secretary of State also went on to consider the appellant's human rights under Article 8 as a freestanding consideration and as to whether there were any exceptional circumstances. The merits of that part of the claim do not need to trouble me at this stage. The letter went on to say that the appellant's application for leave to remain in the United Kingdom was refused and that since she had made an application on 3 June 2013 but her leave to remain had expired some eleven years before, on 14 September 2002, she did not have leave to remain at the time of the application. Accordingly the application for leave to remain in the United Kingdom was refused and the Secretary of State stated "There is no right of appeal against this refusal".

6. Nevertheless there was an appeal that was brought by the appellant to the Tribunal and it was an appeal which was subsequently allowed in a determination made by First-tier Tribunal Judge Prior whose determination was promulgated on 14 April 2014. It is the Secretary of State that appeals against that decision. For the purposes of continuity I have used the expression "appellant" as indicating Miss Rose Demena Morris. In fact the appellant in this appeal is the Secretary of State but for the purposes of continuity I will continue to refer to Miss Morris as the appellant.

7. The statutory provisions are set out in the Nationality, Immigration and Asylum Act 2002. There are rights of appeal which are granted in relation to a specie of decision. That is an immigration decision and it is only an immigration decision that gives rise to a right of appeal. An immigration decision is defined in 82(2) and as to (a) it is a refusal of leave to enter the United Kingdom; as to (b) a refusal of entry clearance; as to (c) a refusal of a certificate of entitlement, as to (d) a refusal to vary a person's leave to enter or remain in the United Kingdom if the result is that the refusal would mean that the person has no leave to enter or remain.

8. Pausing there, none of subparagraphs (a) to (d) can apply in the appellant's case. There are then grounds which I need not set out in (f), (g), (h) and so on, none of which are applicable in the appellant's case. However, there is Section 82(2)(e) which reads as follows:

> "In this part immigration decision means (e) variation of a person's leave to enter or remain in the United Kingdom if, when the variation takes effect, the person has no leave to enter or remain."

9. Consequently the question in this case is was this decision a variation decision. In my judgement it was not. It was not expressed as a variation decision and indeed it could not be as a matter of law a variation decision because there was nothing to be varied. The appellant's extant leave had expired on 14 September 2002. It could not therefore be varied because her leave did not exist. Accordingly there was no decision to vary the appellant's leave.

10. Secondly, the decision itself which is in conventional form, a form which we often see when there is an application made outside the Immigration Rules on Article 8 grounds. It is a decision which is not considered to be or treated as a variation decision. It is a simple refusal to grant leave to remain. It is headed as such and it goes straight into the considerations of Article 8 both within the Rules and outside the Rules. Furthermore, it would make no sense if this was a Section 82 decision if the decision maker had said there is no right of appeal against this refusal because Section 82 flatly contradicted that had it been a variation decision.

11. Finally the Tribunal is constantly confronted with decisions where there is a Section 82 right of appeal and it is stated that there is such a right of appeal and normally the subsection and the subsections (ii) are identified in terms. I am satisfied therefore that this decision carried no right of appeal.

12. The judge, however, approached it on the basis that this was an appeal against an immigration decision falling within Section 82(2)(e) which is as I have already said inaccurate. It was not such a case. The judge also pointed out accurately that there was no removal decision. Of course as soon as a removal decision is made then there will be a right of appeal and that right of appeal will be pursued on Article 8 grounds if the appellant sees fit to do so. However that stage has not been reached and we know

from a series of cases including **Daley-Murdock** that there is no obligation upon the Secretary of State to make a removal decision at the same time as she chooses to make a decision on refusing a person's leave to remain.

13. Accordingly nothing is lost. There might well be a separate ground of appeal but if the appellant is not subject to removal as she is not at the moment, then there can be no violation of her human rights because she is not in jeopardy at present of removal and it is only that removal that would interfere with her private or family life. There is nothing to assist the appellant in Section 92 of the 2002 Act which sets out various rights of appeal. There are appeals which can be made from the United Kingdom but there are also appeals which can only be pursued from outside and it is now well established that an out of country right of appeal is an appropriate and valuable asset and that it does not therefore infringe the appellant's human rights if they have an out of country right of appeal rather than an in-country right of appeal, if that is what is the statue permits.

14. There is an in-country right of appeal in relation to various categories of cases. In particular 92(4) provides that such a right of appeal exists where there is

> "This section also applies to an appeal against an immigration decision if the appellant (a) has made ... a human rights claim while in the United Kingdom."

15. The appellant has indeed made a human rights claim whilst in the United Kingdom. However, it is clear that the section is predicated upon there being an immigration decision and there is no immigration decision in this case, for the reasons that I have stated.

16. For this reason I consider that the First-tier Tribunal Judge made a material error in approaching the appeal in this way. There was no right of appeal to the Tribunal and the ruling that he should have made was that there was no such right of appeal. I therefore allow the Secretary of State's appeal to the extent of setting aside the decision of First-tier Tribunal Judge Prior and limiting to my consideration to a ruling that there was no jurisdiction in the Tribunal to hear the appeal.

Signed Date

Upper Tribunal Judge Jordan