



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/15028/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 29th July 2016**

**Decision & Reasons Promulgated
On 8th August 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between

**ADEBIMPE OLUWATOSIN ADEYEMI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No appearance or representation

For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge Nichols promulgated on 12th January 2016 in which First-tier Tribunal Judge Nichols found that the First-tier Tribunal did not have jurisdiction to hear an appeal by the Appellant against the decision of the Respondent on

31st March 2015, to refuse her an extension of stay in the United Kingdom as a domestic worker in a private household.

2. The Appellant has sought to appeal against that decision for the reasons set out within the Grounds of Appeal. These are a matter of record and therefore not repeated in full here, but in summary it was argued within the Grounds of Appeal firstly, that the judge erred in consideration of the burden of proof in respect of the claim and, secondly, that it is argued there that the judge erred in failing to correctly apply the required burden of proof to the Appellant's case before she issued the decision, which effectively determined the outcome of the appeal in respect of the jurisdictional point, based upon whom the burden of proof was on, in respect of proving whether or not there had been a correct payment of the requisite fee. It was further argued within the Grounds of Appeal that the Appellant, although asking for the appeal to be dealt with on papers, had not been notified in advance that there was to be a jurisdictional issue as to whether or not the Tribunal actually had jurisdiction to hear the appeal.
3. Permission to appeal has been granted in this case by Designated First-tier Tribunal Judge McCarthy on the 28th June 2016, in which he found that although on the face the Grounds of Appeal appear to have little merit because the Appellant was raising an arguments that she could have been presented to the First-tier Judge, he found that that was actually not the main issue in the case and the underlying issue, as set out within the Grounds of Appeal, amounted to the fact that the Appellant did not know that jurisdiction was going to be in dispute at the appeal hearing before First-tier Tribunal Judge Nichols.
4. The original Notice of Appeal was received on 14th April 2015. Although it was argued by the Home Office in the reasons for refusal letter that the Appellant did not have a right of appeal, the appellant sought to address that in the Grounds of Appeal and contended that the application was made before the expiry of her leave.
5. The duty judge at first instance had considered whether or not there should be a preliminary hearing to resolve the jurisdiction point and there is a clear note on the file from the duty judge on 29th April 2015, where the duty judge directed that the case was to be listed before a First-tier Tribunal Judge as a preliminary issue, and it was stated that the judge will determine after hearing evidence and submissions, whether or not there was jurisdiction.
6. However despite the fact that the duty judge had ordered there to be a preliminary hearing on the question of jurisdiction, that did not in fact take place. The notice that was sent out by the First-tier Tribunal was a notice simply listing the case for a substantive hearing on Friday 3rd June 2016. That notice made no reference whatsoever to the question of it being a preliminary hearing in respect of jurisdiction. The case was simply listed for a very full substantive appeal. Thereafter on 18th September 2015 the Appellant's then representatives, Kristal Law, indicated that the Appellant

now wanted her appeal to be decided on the paper evidence and on 2nd December 2015 they indicated they were no longer representing her.

7. On 19th December the Tribunal received a bundle of documents from the Appellant in which she sought to rely upon them in respect of what was said to be the substantive issues. However, it is far from clear having read the file as to whether or not the Appellant actually did understand at that stage that the question to be considered by the First-tier Tribunal Judge was going to be a question as to whether or not the First-tier Tribunal Judge had jurisdiction to consider the appeal, rather than it just being a substantive appeal based upon the merits.
8. Although the Appellant has not attended the appeal hearing before the Upper Tribunal, I do take account of the fact that she had actually written into the Tribunal on 26th July asking for the case to be dealt with on the papers. Although there is no jurisdiction within the Upper Tribunal to consider the case on the papers it is clear from that letter that she clearly did not intend to abandon her appeal today and intended to proceed with the appeal, but wanted the case considered without her having to attend at the appeal hearing.
9. However, as there is no provision for a paper appeal in the Upper Tribunal. However, as the Appellant has indicated that she does not want to attend at the appeal hearing I do consider that it is in the interests of justice to consider the appeal without her being here.
10. Having heard the submissions from Mr Tarlow, Senior Home Office Presenting Officer, on behalf of the Respondent he conceded that given the circumstances of this case that it did appear that there was a procedural irregularity in the case, in that the duty judge had indicated that the case was to be listed as a preliminary issue in respect of jurisdiction, but what appears to have happened is that a notice was sent out simply listing the case for a substantive hearing on the merits and that there was no separate indication given to the Appellant that the jurisdictional point was still in issue and was still to be determined.
11. In my judgement there has been procedural unfairness as a result of the matter being listed simply as a substantive appeal rather than as a preliminary hearing on the jurisdictional issue as directed by the duty judge, and that therefore the Appellant has actually missed out on the opportunity of attending a jurisdictional hearing and making arguments on the jurisdictional point. Although she had indicated that she did not want the appeal to be considered on the papers at first instance, she may well not have done so, had she understood that jurisdiction was still in issue, rather than simply the merits of the appeal itself.
12. The consideration of the appeal by First-Tier Tribunal Judge Nichols therefore did result from a procedural error and gave rise to potential unfairness to the Appellant and in such circumstances, it is the appropriate for the decision of First-tier Tribunal Judge Nichols to be set aside and for

the case to be remitted back to the First-tier Tribunal to be heard before any First-tier Tribunal Judge other than First-tier Tribunal Judge Nichols.

Notice of Decision

13. The decision of First-tier Tribunal Nichols did result from a procedural error on the part of the First-tier Tribunal and did result in potential unfairness to the Appellant and is therefore set aside. The case is remitted back to the First-tier Tribunal for rehearing before any First-tier Tribunal Judge other than First-tier Tribunal Judge Nichols.
14. The First-tier Tribunal Judge did not make any anonymity order and no anonymity order is sought before me. There is no evidence as to why the appellant would require anonymity in this case. I therefore do not make any anonymity order.

Signed

Date 29th July 2016

A handwritten signature in black ink, appearing to read 'RFM McGinty' with a stylized flourish at the end.

Deputy Upper Tribunal Judge McGinty