Upper Tribunal
(Immigration and Asylum Chamber) **Appeal no: HU/21018/2016**

THE IMMIGRATION ACTS

At Field House	**Decision promulgated and sent**
On 17.05.2017	**On 25.05.2017**

Before:

Upper Tribunal Judge John FREEMAN

Between:

Crescencia NGA CHE

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: in person
For the respondent: Mr S Kotas

DECISION AND REASONS

1. This is an appeal, by the appellant, against the decision of the First-tier Tribunal (Judge Lindsey Moan), sitting at Birmingham on 10 November 2016, to dismiss an appeal by a citizen of the Cameroons, born in 1983. The appellant had been refused indefinite leave to remain on 24 August, so by this time had a right of appeal on asylum and human rights grounds only.

2. The appellant had arrived in this country as a student on 7 May 2006, and had had leave to remain on that basis till 22 October 2015. That same day she made a private and family life application, resulting in her leave continuing under s. 3C of the Immigration Act 1971 till the end of the time (14 days) allowed for her to appeal any negative decision made on her application. That was done on 29 March 2016, giving her an out-of-country

NOTE: (1) no anonymity direction made at first instance will continue, unless extended by me.
(2) persons under 18 are referred to by initials, and must not be further identified.

right of appeal. The appellant said she received that decision on 4 April, and produced the envelope in which it arrived, which was seen and accepted by Mr Kotas.

3. On 30 April the appellant applied for indefinite leave to remain, which was refused under paragraph 276B (v) of the Rules, on the ground that she had been here unlawfully for more than 28 days since 23 October 2015 when she made the application. This ignored the effect of s. 3C (2) of the Immigration Act 1971: since the appellant had another 14 days to appeal the decision, her leave to remain continued till 12 April, even without taking account of the date she received her copy, and so her application of 30 April was less than 28 days out of time.

4. It will be remembered that the 30 April application was valid, if in time: see again s. 3C

> (4) A person may not make an application for variation of his leave to enter or remain in the United Kingdom while that leave is extended by virtue of this section.
> (5) But subsection (4) does not prevent the variation of the application mentioned in subsection (1)(a).

Subsection (5) refers in this case to the application of 22 October 2015, which is to be treated as varied by the one of 30 April.

5. All this was agreed by Mr Kotas, who helpfully went on to refer me to the combined effect of the Immigration (Continuation of Leave) Notices Regulations 2006, and the Immigration (Leave to Enter and Remain) Order 2000. Since that too is common ground, it is enough for me to note that the 14 days for appealing the 30 March decision did not start running till 4 April, when the appellant actually received it. It follows that, by the time she made her 30 April application, she had been here without leave for only 12 days, and her application should have been treated as in time.

6. At one time I could simply have allowed the appeal on the basis that the decision was contrary to the law and the Rules, and that would have been that. However, now that rights of appeal have been restricted to asylum and human rights grounds, it is not so simple. The appellant complained that there was nothing in the decision under appeal to warn her that she could only appeal on such grounds.

7. It is true that the 'information notice' which went out with the decision did say she had a right of appeal "… against the refusal of your human rights claim on the ground that the decision is unlawful under s. 6 of the Human Rights Act 1998". However, especially as she hadn't made a human rights claim in the first place, but relied on the Rules, this was hardly calculated to be clear even to an educated person like her, but one who was acting without legal advice. Nor did the heading to the box (no. 3) she filled in on her appeal form make things any clearer, simply referring to the same statutory provision.

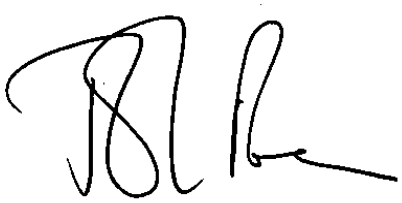
8. Under the present legislative scheme, it has been clear at least since *MF (Nigeria)* [2013] EWCA Civ 1192 that proper establishment of the position under the law and the Rules is an absolute prerequisite of proper determination of a human rights claim. Here there has been nothing to put someone in this appellant's position effectively on notice that such a claim

was required for her right of appeal to be of any real use; and so no human rights decision by the respondent.

9. I need to make an order which will allow both those things to take place, if necessary. If I were to order a fresh hearing, either before myself or a first-tier judge, then the respondent would need first to make a fresh decision for it to be effective. It seems preferable simply to set aside the decision under appeal, and to declare that the 30 April application for indefinite leave to remain is still to be decided by the respondent, on the basis that the appellant had been here without leave for less than 28 days when she made it.

10. If on further consideration the respondent grants the application, then there will be no more to be done; if not, then this time the appellant will know that she needs to put forward a valid human rights claim in her notice of appeal, if she is to succeed in challenging the fresh decision. If it came to that, then she might wish to take advice on it; but that would be up to her.

Appeal allowed: decision under appeal set aside
Application for indefinite leave to remain to be reconsidered by respondent



(Judge of the Upper Tribunal)
Decision signed: **18.05.2017**