



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

Appeal Number: IA 08284 2013

THE IMMIGRATION ACTS

Heard at Field House

On 28 October 2013

Determination

Promulgated

On 25 November 2013

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

FREDERICK STEPHANUS DOHNE

Respondent

Representation:

For the Appellant: Mr J Parkinson, Senior Home Office Presenting Officer

For the Respondent: The respondent did not appear and was not represented

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal allowing the appeal of the respondent, who I will call the claimant against, against the decision of the Secretary of State refusing his application for further leave to remain as a civil partner.
2. I had to think very carefully before going ahead with this case in the claimant's absence. The hearing took place on a day when there had been massive travel disruption because of heavy rain and a storm which had been very destructive in some parts of the country. The claimant has an address in the West Country and the Tribunal's most recent communication from him was a short note in which he explained very clearly, and appropriately, that he had changed his address to a holiday park and it is that address that has been used for service of the notice of hearing. It is right to say that the correspondence suggested that he did not understand the significance of the Secretary of State having been

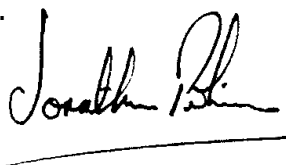
given permission to appeal but he should have taken advice when he received the notice of hearing.

3. There was a mobile telephone number on that correspondence which my clerk tried several times in an effort to make contact with the claimant but it proved to be unsuccessful. She informed me that it was a “dead number”.
4. I did not hear the appeal until about 12:15 pm. I am satisfied that the claimant would have had sufficient time to have given an explanation for his absence if he had been so minded.
5. For the reasons given below I have set aside the decision of the First-tier Tribunal and substituted a decision dismissing the claimant’s appeal. As far as I can see there was nothing before the First-tier Tribunal to justify a different outcome and I am satisfied that if I had adjourned the appeal I would incurred more expense and probably raised the claimant’s hopes unfairly without achieving anything useful.
6. The Secretary of State refused the application for two reasons. The first is that the claimant had not produced a document showing that he had competence in the English language in the way required by the Rules and the second is that he had been untruthful because he had not disclosed details of a criminal conviction. The point relating to the criminal conviction fell away in the First-tier Tribunal. The Secretary of State wholly failed to produce any evidence of any kind to support the contention that there was a criminal conviction that ought to have been disclosed and the First-tier Tribunal Judge found the very sketchy explanation given by the complainant, namely that he had been convicted of a motoring offence and the conviction was now spent, was sufficient to rebut the assertion that the complainant had failed to comply with the Rules relating to disclosure.
7. The First-tier Tribunal Judge allowed the appeal. It is not entirely clear whether it was allowed with reference to Article 8 of the European Convention on Human Rights or if it was allowed under the Rules but I have to say I cannot work out how the appeal could have been allowed properly for either reason.
8. The failure to produce the required certificate is fundamental. The appeal could not possibly have been allowed properly under the Rules when the certificate was not produced. It is conceivable that the appeal could have been allowed properly under human rights grounds although I have to say the determination does not explain how the appeal was allowed on that basis if that indeed is what the First-tier Tribunal decided to do.
9. The First-tier Tribunal Judge has, I find, taken a wrong turn in his analysis. He has been concerned about the evidential flexibility rule but this is not an evidential flexibility case. The evidential flexibility rule is an administrative mechanism whereby the Secretary of State’s officials can lawfully apply a little bit of leniency or flexibility into the very strict requirements of the Rules where there is a proper reason to think that a person ought to be able to satisfy the requirements of the Rules but has not produced the necessary documents because of some administrative

error. The paradigm example of this is where a person who produces a whole series of documents and for no obvious reason omits one that is needed to complete the series. In that kind of circumstance there is a duty on the Secretary of State to raise the point with the claimant to see if it can be addressed. This is not remotely that kind of case. This is a case where a person does not have the necessary qualification. There is no doubt about that because the claimant asserts, rather firmly, that he does not see any need to have the qualification because he comes from an English-speaking country. He is a citizen of South Africa and in a colloquial sense which might be described as an English-speaking country but is so categorised under the Rules and it is the Rules that apply.

10. There are findings by the First-tier Tribunal Judge based on the material before him which are helpful to the claimant. Particularly at paragraph 7 it is recorded that there is no suggestion that the relationship that forms the basis of the application was other than genuine or subsisting and there was certainly evidence that the claimant, at least at the material time, was in regular work. It may well be that the financial requirements of the Rules were also satisfied. There is a suggestion in the First-tier Tribunal's decision that the Secretary of State was somehow remiss in keeping identification documents that prevented the claimant obtaining the necessary certification about his competence in the English language. Mr Parkinson submits, and I agree, that this criticism is completely unexplained. There is no reason to think that anything retained by the Secretary of State would stop somebody doing a language course if that is what they wanted to do. Even if the Secretary of State has kept a passport, which seems to be the case. It is out of date and it is open to the claimant to get another South African passport from his government if he is so minded. This point really goes nowhere.
11. I cannot follow the First-tier Tribunal Judge's reasoning and ascertain why the appeal has been allowed on human rights grounds if it has.
12. I therefore set aside the decision of the First-tier Tribunal in its entirety and on the material before me I re-make the decision dismissing the appeal. I dismiss it under the Rules because the requirements about proof of competency in the English language are not satisfied. I dismiss it on human rights grounds because although there is evidence of a subsisting and quite long relationship there is nothing before me that show that returning to South Africa to make an application in accordance with the Rules would be disproportionate and there is nothing to stop the claimant making an application outside the Rules, which no doubt would be looked at appropriately, if that is what he chose to do. It may that such an application should be allowed on human rights grounds but I can see nothing before me that would justify such a conclusion.
13. It follows therefore that I set aside the decision of the First-tier Tribunal and I substitute a decision dismissing the claimant's appeal against the Secretary of State's decision.

Signed
Jonathan Perkins
Judge of the Upper Tribunal



Dated 21 November 2013

Jonathan Blum