



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/16557/2013

THE IMMIGRATION ACTS

Heard at Birmingham Sheldon Court
On 2 December 2013

Determination Promulgated
On 9 December 2013

Before

DEPUTY UPPER TRIBUNAL JUDGE McCARTHY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OMER HAMAYAN

Respondent

Representation:

For the Appellant: Mr M Hussain, Senior Home Office Presenting Officer

For the Respondent: Mr A Pipe, Counsel instructed by Bassi Solicitors, Birmingham

DETERMINATION AND REASONS

1. On 17 October 2013, the Secretary of State was granted permission to appeal against the determination of First-tier Tribunal Judge Nixon that was promulgated on 14 August 2013. The Secretary of State argued that Judge Nixon had failed to give adequate reasons for finding that the immigration decision was not proportionate in respect of the appellant's protected family life.
2. Mr Hussain relied on the grounds of appeal settled by his colleague, Mr David Neale on 20 August 2013. He did not pursue the arguments in the first paragraph, which related to private life rights. Instead, he focused on Mr Hamayan's family life rights.

3. Mr Hussain argued that Judge Nixon failed to have regard to the fact that when Mr Hamayan applied to vary his leave to remain he did not rely on family life rights. This was unsurprising because at that time he was not in a relationship let alone married. Mr Hussain amplified this argument by pointing out that both Mr Hussain and his wife were aware that his immigration status was precarious. The failure of Judge Nixon to consider these issues meant that her findings and conclusions lacked adequate reasoning because these were material issues that had to be considered.
4. Mr Pipe replied by reminding me of the context in which the application and appeal had to be considered. The application for further leave to remain was made prior to the introduction of appendix FM and paragraph 276ADE of the Immigration Rules and they should not have been applied. Mr Pipe acknowledged that the application had not referred to family life issues but pointed out that Judge Nixon accepted Mr Hamayan's explanation for not having done so. Mr Pipe reminded me that the grounds of appeal did not seek to challenge any of the finding of fact made by Judge Nixon, who identified the couple as in a genuine relationship.
5. In conclusion, Mr Pipe argued that there was no need for a judge to give extensive reasons. In this case Judge Nixon had in essence found that Mr Hamayan would have met the requirements of the Immigration Rules at the date of decision (which because of transitional provisions were those in part 8 of HC395) and that the only reason for requiring him to leave the UK was to satisfy immigration formalities. It was never proportionate for a State to interfere with a person's family life rights merely for bureaucratic reasons.
6. As I indicated at the end of the hearing, I find against the Secretary of State. I reserved my reasons which I now give.
7. The grounds do not seek to challenge the factual findings made by Judge Nixon. She found that Mr Hamayan would have met the requirements of the immigration rules as they applied to him. In so doing, Judge Nixon recognised that the immigration rules are an expression of the public interest. In refusing the application that generated this appeal, it would appear that the Secretary of State failed to have regard to her own transitional provisions which were themselves part of the expression of public interest and the need to act fairly. The Judge rightly corrected this error.
8. Implicit in Judge Nixon's determination is the fact that because the appellant was last granted leave as a tier 4 (general) student and because he had applied in time for that leave to be extended, he continued to benefit from that leave as it was statutorily extended by section 3C of the Immigration Act 1971. I say this is implicit because these facts are recorded early in the determination. Mr Hussain acknowledged that there was no bar to those with such leave switching into a category relating to spouse so long as they met the requirements of the immigration rules. In light of this, the fact that Judge Nixon found that the requirements of the immigration rules that applied to Mr Hamayan were could only mean there was no public interest in requiring him to leave the UK in order to resolve his immigration status.
9. In addition, it must be recalled that Judge Nixon had to have regard to the facts as they were at the date of hearing, a fact she reminded herself of in paragraph 5.

Although Judge Nixon recognised that those facts were significantly different to the facts known to the Secretary of State when the refusal decision was made, she understood that the law required her to take the approach she did to the evidence; in other words she could not ignore the evidence that Mr Hamayan was married and in a genuine and subsisting relationship.

10. It is trite law that interference in family life merely in order to ensure a person complies with the formalities of immigration control will be disproportionate. I stress the fact that it is the requirement of ensuring a person to comply with the formalities of immigration control that is likely to be disproportionate and not the control itself. In many cases where matters need to be investigated there is a positive requirement that a person is subjected to proper immigration control which will necessitate them leaving the UK. Judge Nixon, however, found that Mr Hamayan was not in this situation; his position was akin to that established by the House of Lords in Chikwamba [2008] UKHL 40. It was open to Judge Nixon so to do given the findings she had made.
11. I am fully satisfied that the determination contains adequate reasons that explain how Judge Nixon reached her findings and conclusions. The Secretary of State's grounds seek to find difficulties where there are none. If anything, the grounds simply reflect the author's inability to recognise that an experienced and specialist judge will not need to recite every basic legal point. A judge writes for the parties and can assume that they have some knowledge of the issues and the law that applies. I find nothing whatsoever wrong in law with regard to the approach Judge Nixon has taken or with her findings and conclusions because, as I have shown, her reasoning is more than adequate despite it being concise.
12. I add one final observation to ensure clarity; the fact that I have had to examine the determination forensically should not suggest to anyone that Judge Nixon should have included more in her determination. Her conciseness is commendable.

Decision

The Secretary of State's appeal is dismissed.

The determination of Judge Nixon does not contain an error on a point of law and is upheld.

Signed

Date

Deputy Judge of the Upper Tribunal