



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

Appeal Number: IA/16000/2014

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 16 September 2014  
Extempore**

**Determination  
Promulgated**

**On 19 September 2014**

**Before**

**UPPER TRIBUNAL JUDGE RINTOUL**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**and**

**MR SIMON KINUTHIA NJOROGE**

Claimant

**Representation:**

For the Secretary of State: Mr N Bramble, Home Office Presenting Officer  
For the Claimant: No appearance

**DETERMINATION AND REASONS**

1. The Secretary of State appeals with permission against the determination of First-tier Tribunal Judge Heynes sitting in Manchester. The determination was promulgated on 22 May 2014 in which Judge Heynes allowed the appeal of Mr Simon Kinuthia Njoroge ("the claimant") against the decision of the Secretary of State made on 19 March 2014 to refuse to grant him further leave to remain as a Tier 5 temporary worker (creative

and sporting) and to remove him pursuant to Section 47 of the Immigration, Asylum and Nationality Act 2006.

2. The claimant is a circus performer and on this occasion the application was made for him to be granted further leave to remain pursuant to his employment by Zippos Circus. The appropriate certificate of sponsorship was submitted and in the refusal letter issued by the Secretary of State on 19 March 2014 it is clear that the 40 points requested and required were awarded.
3. In the refusal letter, after stating that creative workers can apply for an extension for a maximum of twelve months at a time up to a total of 24 months if they remain with the same sponsor, the respondent wrote:

“In view of the fact that you have previously been granted leave to enter from 12 February 2013 until 9 December 2013 and leave to remain from 13 January to 14 March 2014 in the United Kingdom the Secretary of State is not satisfied that a further period of leave to remain in this category can be granted.”

Nothing more is said.

4. In the grounds of appeal to the First-tier Tribunal the claimant says that he believes that the Secretary of State miscalculated the weeks in relation to the time he was allowed to have leave to remain and reference is made to a letter from his employer in support. That letter, dated 29 March 2014, gives a calculation of the time worked, a total of 93 weeks which is under the 104 weeks allowed and reconsideration is requested.
5. There was no oral hearing and Judge Heynes’ determination is short. The judge says:

“It is common ground that creative workers can apply for an extension of leave for a maximum of twelve months at a time up to a total of 24 months if they remain with the same employer. The refusal notice states that the [claimant] having previously been granted leave to enter from 12 February 2013 until 9 December 2013 and leave to remain from 13 January to 14 March 2014 in the United Kingdom the Secretary of State is not satisfied that a further period of leave to remain in this category can be granted. No further explanation is offered. It is not claimed that the [claimant] has a different sponsor.”

6. After recording the total number of weeks’ leave granted, the judge says:

“There is nothing in the Rules preventing more than one application for an extension of leave. The cumulative total is less than 104 weeks. The [claimant] meets the requirements of the Rules.”

7. The Secretary of State then sought permission to appeal on the basis that the judge had erred in finding that it had not been claimed that the

appellant has a different sponsor and that that was in fact the respondent's case and thus on the basis of paragraph 245ZR(b) of the Immigration Rules no extension would have been permissible as the appellant previously was granted leave on the basis of his employment with Tip Top Productions Limited and that he sought further leave to remain as the employee of Zippos Circus.

8. It is further said that, as the refusal letter notes, since the claimant has already completed a twelve month period with Tip Top Productions a further period of leave can only be granted where the claimant remains with the same employer and it is for the claimant to establish that the requirements of the Rules are met.

9. Permission to appeal was granted by First-tier Tribunal Judge Holmes on 28 July 2014. Judge Holmes said:

“As the grounds complain, it is arguable the judge has misunderstood the issues with which he was required to engage and/or the applicable Immigration Rules. The appellant was seeking to change sponsor and was seeking to extend his leave beyond the maximum twelve month period applicable if he did so.”

10. Subsequent to that, although there was no response pursuant to Rule 24 of the Procedure Rules, the claimant's solicitors wrote to the Tribunal on 13 September 2014 stating that the claimant and other members of his troupe had decided to voluntarily leave the United Kingdom. A copy of a notice sent to the respondent to that effect is attached to that letter. The letter requests that the hearing be vacated.

11. The adjournment request or rather the request to vacate the hearing was refused on the basis that this was an appeal made by the Secretary of State and the claimant's solicitors were informed that the hearing would take place. Perhaps inevitably there was no appearance for or on behalf of the claimant when the matter came before me.

12. It transpired from the submissions made by Mr Bramble on behalf of the Secretary of State that there had been on the Secretary of State's file evidence of the fact that the claimant had been employed by Tip Top Productions Limited prior to working for Zippos Circus. That is not of course evidence which could be taken into account at this stage in assessing whether the judge erred in law. I am satisfied that that material was not before Judge Heynes at the time he reached his decision. Despite the statement as to what the Secretary of State's case had always been, that was not the case set out in the refusal letter or disclosed in the material put before the First-tier Tribunal. It follows that the grounds on which permission were granted were at best misleading if not disingenuous.

13. It is, however, apparent that there is no acceptance in the refusal letter that that requirement of the Immigration Rules, that there has been no

change of sponsor, had been satisfied. Whilst it is correct to say, as Judge Heynes did, that that had not been claimed, nonetheless it is incumbent on an appellant to demonstrate that he meets *all* the requirements of the Immigration Rules. This is not a case where the Secretary of State had expressly accepted that the claimant met that specific requirement, although it was expressly accepted that he was entitled to the 40 points claimed in his application.

14. Whilst Judge Heynes says that all the requirements of the Immigration Rules had been met it is not clear how he came to that conclusion with respect to the requirement for there to have been no change of sponsor, as there is no evidence on that issue either way, and on that basis, I am satisfied that his conclusions are not adequately reasoned. For that reason, it is evident that the determination did involve the making of an error of law and I therefore set it aside.
15. In proceeding to remaking the decision I am satisfied that it would be appropriate to take into account the letters handed up by Mr Bramble which had been sent to the Secretary of State by Zippos Circus in support of the application. It is evident from these that the claimant and indeed other members of the same troupe had been employed by Tip Top Productions and that they had been granted visas on that basis. The letter expressly states that they are now changing employers with the full knowledge of the previous sponsor and the previous certificates of sponsorship are to be withdrawn.
16. In the circumstances I am satisfied that the claimant has not met the requirement of paragraph 245ZR(b) and 245ZR(f) of the Immigration Rules which permit an extension beyond twelve months only where there has been no change in employer, and on that basis the appeal under the Immigration Rules falls to be dismissed.
17. It is not submitted that the appeal should be allowed on any other basis, and I dismiss it on all grounds.

### **SUMMARY OF CONCLUSIONS**

- 1 The decision of the First-tier Tribunal did involve the making of an error of law and I set it aside.
- 2 I remake the decision by dismissing the appeal on all grounds.

Signed

Date: 18 September 2014

Upper Tribunal Judge Rintoul