



Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/04191/2015

THE IMMIGRATION ACTS

Heard at Birmingham
On 16 February 2016

Decision & Reasons Promulgated
On 23 February 2016

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

Sean Poul Dixon
[No anonymity direction made]

Claimant

Representation:

For the claimant: Not represented

For the respondent: Mr D Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The claimant, Sean Poul Dixon, date of birth 15.11.83, is a citizen of Australia.
2. This is the appeal of the Secretary of State against the decision of First-tier Tribunal Judge Graham promulgated 9.6.15, allowing on human rights grounds the claimant's appeal against the decision of the Secretary of State, dated 19.1.15, to refuse his application made on 29.9.14 to vary leave to enter or remain on the basis of family and private life, and to remove him from the UK, pursuant to section 47 of the Immigration Asylum and Nationality Act 2006. The Judge heard the appeal on 8.5.15.

3. First-tier Tribunal Judge Holmes granted permission to appeal on 15.7.15.
4. Thus the matter came before me on 16.2.16 as an appeal in the Upper Tribunal.

Error of Law

5. There was no attendance by or on behalf of the claimant and no Rule 24 reply to the grounds of application for permission to appeal. There is no resistance to the appeal of the Secretary of State.
6. The absence of the claimant and the apparent lack of interest in the appeal is explained by the fact that Mr Dixon made a voluntary departure from the UK on 18.11.15 and has not applied to return. However, his departure does not automatically dispense with the appeal.
7. For the reasons set out below, I find that there was such error of law in the making of the decision of the First-tier Tribunal as to required the decision of Judge Graham to be set aside and remade, which I do by dismissing the appeal on all grounds.
8. It is clear for the reasons set out by Judge Graham that having arrived as a family visitor the claimant could not meet the requirements of the Immigration Rules for leave to remain, either under Appendix FM or paragraph 276ADE
9. Judge Graham failed to identify any compelling circumstances to justify going on to consider the claimant's circumstances outside the Rules pursuant to article 8 ECHR, pursuant to Singh v SSHD [2015] EWCA Civ 74 and SS (Congo) [2015] EWCA Civ 387. Indeed, at §18 of the decision the judge specifically found that there were no such circumstances to warrant a grant of leave outside the Rules. Nevertheless, the judge went on to conduct an article 8 assessment. To do so in the absence of compelling circumstances was an error of law.
10. In summary, the article 8 proportionality assessment was flawed. The judge relied on the temporary absence of the claimant whilst he returned to Australia to seek entry clearance, stating, "The length of that absence cannot be determined precisely and because of the children's young ages and given that their father is their primary carer any absence by the appellant will have an adverse effect on the children give(n) their strong connection with him." The judge failed to appreciate that the waiting time for an entry clearance application in Australia is very short. At the time of the hearing 100% of applications were processed within 10 days.
11. Further, the judge appears to have misunderstood or misapplied both paragraph 276ADE and section 117B of the 2002 Act, as well as the guidance in SS (Congo) and EV (Philippines). No account was taken of the provision that little weight should be accorded to a private life developed whilst his immigration status was precarious, or of his intentions when coming to the UK where his wife and children were already present. No weight is accorded to the public interest in maintaining immigration control. No account is given to the policy of no switching from the visitor route or the

inability to meet any other provisions of the Rules. No account was taken as to whether the claimant would succeed under any future application.

12. This was a family that could safely live in Australia, either indefinitely, or by way of holiday whilst the appellant made his entry clearance application. No reasoned decision was provided as to why the claimant should not be expected to return to Australia to make the appropriate application, paying the requisite fee. If, as claimed, he could now meet the requirements for entry clearance, and his wife and children chose to remain in the UK, the period of absence would be very short. The decision fails to identify adequate reasons why he should effectively be granted 3 years discretionary leave when a spouse is only granted a probationary period of 2 years. In the circumstances, the finding that there would be disproportionate interference to family life caused by removal of the claimant was irrational. In essence, this was a freewheeling approach to article 8 that cannot be sustained.
13. On the facts of this case as set out in the decision of the First-tier Tribunal, there is nothing either disproportionate or unjustifiably harsh in requiring the claimant to leave the UK to make entry clearance application from Australia. This is not a Chikwamba case, as the application for entry clearance is not just a formality; the claimant will have to demonstrate that he can meet all the requirements, including the financial threshold; on evidence the Secretary of State is entitled to examine. There is also to be considered the public policy of deterring those entering as visitors from short-circuiting the immigration route all other applicants have to follow. There was a route for entry clearance that the claimant could and should have followed rather than entry as a family visitor. In summary, this is an appeal that from the outset had no prospect of success, and should have been dismissed at the First-tier Tribunal appeal hearing.

Conclusions:

14. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I re-make the decision in the appeal by dismissing it on all grounds.



Signed
Deputy Upper Tribunal Judge Pickup

Dated

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue.

Given the circumstances, I make no anonymity order.

Fee Award

Note: this is not part of the determination.

In the light of my decision, I have considered whether to make a fee award.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal has been dismissed.

A handwritten signature in black ink, appearing to read 'Pickup', written in a cursive style.

Signed
Deputy Upper Tribunal Judge Pickup

Dated