



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

Appeal Number: IA/12408/2014

THE IMMIGRATION ACTS

Heard at Field House

On 16 June 2015

Determination

Promulgated

On 9 July 2015

Before

DEPUTY JUDGE DRABU CBE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

Mr MAHISHAN SUMUDITHA LIYANAGE

ANONYMITY DIRECTION NOT MADE

Respondent

Representation:

For the Appellant: Mr David Clark, Senior Presenting Officer.

For the Respondent: Ms G Kiai of Counsel instructed by Lighthouse, Solicitors.

DECISION AND REASONS

1. This matter came before me following the favourable decision of the claimant's (Mr Mahishan Sumuditha Liyanage's) appeal by First Tier Tribunal and the grant of permission to appeal to the Secretary of State for the Home Department, hereafter known as the appellant.
2. The respondent is a national of Sri Lanka. He had applied for grant of indefinite leave to remain in the United Kingdom on the basis that he had lived in the United Kingdom lawfully for at least ten years (Paragraph 276B

of the Rules). The appellant refused that application on 19 February 2014 and on the same date the appellant issued removal directions against the respondent under Section 47 of the Act.

3. On 12 January 2015, Judge H Graves, a Judge of the First Tier Tribunal heard the appeal at Hatton Cross. Both parties were represented at the hearing. The respondent and his three witnesses gave oral evidence that in effect adopted their written witness statements. At the end of the hearing, Judge H Graves reserved his decision, which he gave in his written determination promulgated on 6 February 2015. Taking account of the relevant law and the appellant's guidance on "Long Residence and Private Life" Version 10, the Judge allowed the appeal under the Immigration Rules, rejecting the appellant's contention that there had been two gaps in the respondent's stay of at least ten years in the United Kingdom. The Judge gave reasons for his conclusion on alleged gaps in Paragraphs 35, 36, 37, 38, 39, 40, 41, 42, 43 and 44 of the determination.
4. On 11 February 2015 the appellant sought permission to appeal to the Upper Tribunal contending that the Judge of the First Tier Tribunal had made a material error of law and misdirected himself. The grounds of appeal cited the relevant paragraph of the Rules (276 B (i) (a) and (v)).
5. The grounds went on to repeat the assertions it had made in her letter of refusal in relation to the two gaps in the respondent's continuous residence and the rest of the grounds contended that the appeal should not have been allowed, and that even if it had to be allowed it should have been allowed to the limited extent of being remitted to the appellant to make a fresh decision.
6. The application for permission to appeal came for a decision before First Tier Judge Levin. He granted the application. The decision was made on 25 March 2015 and for what follows it is critical that I reproduce verbatim the reasons for decision to grant permission. Judge Levin in paragraph 1 puts down the narrative that led to the application. In paragraph 2 he states, "It is arguable that the Judge's finding that the appellant's lawful residence in the UK was not broken was materially flawed." In paragraph 3 the Judge states, "However as the Judge allowed the Appeal under the Immigration Rules and not on the grounds that it was not otherwise in accordance with the law there is no merit in the second ground." And the final paragraph of the decision states, "As the first ground is arguable it follows that the grounds and the decision disclose an arguable error of law."
7. At the hearing before me the respondent relied on the President's judgement in **Nixon (permission to appeal grounds) [2014] UKUT 00368) IAC** and argued that the decision granting permission to appeal was fundamentally defective as it had failed to identify at all or with any clarity the arguable error of law which was material to the decision. Mr Clark representing the appellant sought a short adjournment to consider the implications of the Nixon decision in this appeal. This was granted.

8. When the hearing reconvened Mr Clark took me through the determination arguing that the findings of facts made by Judge H Graves were “wrong”. He argued that the written grounds of appeal submitted by the appellant were clear in stating with clarity that the decision made by Judge H Graves was in material error of law. He contended that as full particulars of the material error of law had been set out in the grounds in support of the application, the principles set out in Nixon had no application in this case.
9. In response Ms Kiai, counsel for the respondent took me through the grounds upon which the application had been made. She contended that the ground 4 is no more than a summary of the appellant’s case upon which Judge H Graves had made the decision to allow the appeal. So the appellant, she contended was seeking to re-argue the facts without identifying a material error of law in the decision of Judge H Graves. She drew my attention to the Rule 24 response that the respondent had filed on 10 April 2015. The appellant had therefore had sufficient opportunity to prepare its case in the light of the decision in Nixon. She argued that the Upper Tribunal had no jurisdiction to proceed with this appeal as no material point of law can be found within the formulated grounds of the appellant. Judge Lewis, she said, had been wrong to grant permission and that the principles of law and procedure as set out in the Nixon decision (in particular paragraphs 23 and 24 thereof) apply to this appeal. She asked that I find that the Upper Tribunal has no jurisdiction to determine this appeal. In the alternative, Ms Kiai asked that I dismiss the appeal as no material error of law could be found in the decision of the First Tier Judge.
10. I reserved my decision, which I give with the following reasons. Having considered the arguments advanced before me and the decision with reasons given by Judge H Graves and in particular the decision of Judge Levis “granting permission to appeal”, I find that in accordance with the principles set out in the case of Nixon, I have no jurisdiction to determine this appeal. In coming to this decision I have also given careful consideration to the grounds of appeal placed before the Tribunal on 11 February 2015. None of the grounds submitted identify the alleged error of law or its materiality to the decision. The decision given by Judge Levin simply says in paragraph 4 “As the first ground is arguable it follows that the grounds and the decision disclose an arguable error of law.” The first ground states’ The Respondent seeks permission to appeal in time, against the decision of the First Tier Tribunal Judge Graves dated 6 February 2015 allowing the Appellant’s appeal against the respondent’s decision to refuse the Appellant’s application for leave to remain in the UK on the grounds of his long residence and to issue directions to remove the Appellant from the UK to Sri Lanka by way of directions under section 47 of the 2006 Act.” I cannot understand what Judge Levin meant by saying, “As the first ground is arguable it follows that the grounds and the decision discloses an arguable error of law”. Judge Levis does not say how and why the first ground is arguable and nor does the Judge say in his final paragraph that the “error” in law, whatever that was, is material to the decision. He simply says “arguable error of law”. That is the wrong test as has been explained by the learned President in the decision in Nixon. Most

respectfully I adopt his reasoning and the rationale behind the relevant law.

11. If I am wrong in my decision of lack of jurisdiction, having engaged with the grounds upon which permission to appeal has been granted I find that the decision of Judge H Graves is not in material error of law. The findings made by Judge H Graves accord with the evidence that was placed before him and which the Judge appraised correctly applying the relevant law as is evident from paragraphs 35, 36, 37, 38, 39, 40, 41, 42 and 43 of the determination. I am satisfied that the findings and conclusions of the Judge were comfortably open to the Judge, having regard to the issues raised.
12. The appeal is dismissed as I have found no material error of law and the grounds do not identify any material error of law in this appeal. Permission to appeal should not have been granted in this matter.

K Drabu CBE
Deputy Judge of the Upper Tribunal

Date: 5 July 2015