Upper Tribunal
(Immigration and Asylum Chamber)

Nixon (permission to appeal: grounds) [2014] UKUT 00368 (IAC)

THE IMMIGRATION ACTS

Heard at Sheldon Court, Birmingham	**Determination Promulgated**
On 09 July 2014	.....

Before

The President, The Hon. Mr Justice McCloskey

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

PAUL NIXON

Respondent

Representation:

For the Appellant: Mr Smart, Senior Home Office Presenting Officer.

For the Respondent: Mr M Azmi (of Counsel), instructed by Genesis Law Associates Limited.

Whilst making due allowance where an applicant for permission to appeal to the Upper Tribunal is unrepresented and in respect of the requirement to consider obvious points arising under the Refugee Convention or ECHR (R v Secretary of State for the Home Department ex parte Robinson [1997] 3 WLR 1162), the First-tier Tribunal and the Upper Tribunal can be expected to deal brusquely and robustly with any application for permission that does not specify clearly and coherently, with appropriate particulars, the error(s) of law said to contaminate the decision under challenge. Besides placing unnecessary demands upon the judiciary, poorly compiled applications risk undermining the important value of legal certainty and causing unfairness to the other party.

DETERMINATION AND REASONS

1. This appeal has its origins in a decision made on behalf of the Secretary of State for the Home Department (the "*Secretary of State*"), dated 24 September 2013, whereby Mr Nixon's application for leave to remain in the United Kingdom, based on Article 8 ECHR, was refused. Mr Nixon's appeal was allowed by the First-tier Tribunal (the "*FtT*"). The Secretary of State appeals, with permission, to this Tribunal.

2. I draw attention to the two grounds upon which permission to appeal were formulated:

   [1] "*The Judge erred in according no weight to the emails from a local authority social services department to the effect that the Appellant was not living with his wife and child.*"

   [2] "*The Judge erred in assessing the credibility of the three witnesses (besides sponsor, appellant and child) who gave evidence.*"

   The grant of permission to appeal focused exclusively on the second of these grounds and was couched in the following terms:

   > "*The grounds submit the Judge erred in law in her credibility assessment of the three witnesses …*
   >
   > *It is arguable that the Judge erred in law by finding that the three witnesses … gave evidence honestly and using that finding as the basis for finding the Appellant's evidence credible ….*
   >
   > *It is arguable that the Judge gave inadequate reasons for finding that the Appellant lived with his wife in a subsisting relationship.*"

   The permission Judge added:

   > "*The grounds may be argued.*"

3. It is appropriate to draw attention to the governing statutory and regulatory regime. Section 11(2) of the Tribunals, Courts and Enforcement Act 2007 (*"the 2007 Act"*) confers a right of appeal to the Upper Tribunal against decisions of the FtT, provided that permission to appeal is granted by one or other. This has been the governing statutory provision since the introduction of the new two tier system with effect from 15 February 2010. Pursuant to section 11(5) and certain measures of related subordinate legislation, specified decisions are excluded from the appeals regime: decisions in asylum support appeals, bail decisions and any procedural, ancillary or preliminary decisions in appeals, as defined.

4. The requirement to secure permission to appeal establishes a pre-condition, or threshold, of real substance. The content of applications for permission to appeal is regulated by subordinate legislation. Rule 24(5) of The Asylum and Immigration Tribunal (Procedure) Rules 2005 (the "*2005 Rules*") provides:

> "*An application under paragraph (1) must –*
>
> *(a) identify the decision of the Tribunal to which it relates;*
>
> *(b)* ***identify the alleged error or errors of law in the decision****; and*
>
> *(c) state the result the party making the application is seeking.*"
>
> [My emphasis.]

Rule 25(4) provides that in determining permission to appeal applications, the FtT "*must*" provide written reasons for its decision. Further, per Rule 25(5), the FtT may give permission to appeal on limited grounds but, in doing so, must provide its reasons for refusing permission on any other ground. By Rule 21 of the Tribunal Procedure (Upper Tribunal) Rules 2008, an unsuccessful applicant for permission to appeal may renew the application before the Upper Tribunal, Immigration and Asylum Chamber *("UTIAC")*. The decision of UTIAC on such applications is final, subject to limited challenge in the Administrative Court by judicial review: see Cart v Upper Tribunal [2011] UKSC 28 and Eba v Advocate General for Scotland [2011] UKSC 29.

5. UTIAC Guidance Note 2011 No 1 must also be considered. This was introduced in July 2011 and amended in September 2013. It makes clear that the threshold test for granting permission to appeal against appealable decisions of the FtT is whether an arguable material error of law has been demonstrated. The possibility of granting permission in cases where an arguable, but evidently immaterial, error of law has been committed is recognised. The general rule enunciated in Anoliefo (permission to appeal) [2013] UKUT 00345 (IAC) should be noted. The President stated, at [16]:

> *"Where there is no reasonable prospect that any error of law alleged in the grounds of appeal could have made a difference to the outcome, permission to appeal should not normally be granted in the absence of some point of public importance that is otherwise in the public interest to determine"*.

FtT Judges considering applications for permission to appeal must also be alert to their power under rule 60 of the 2005 Rules to set aside the decision challenged on the grounds of clerical error or other accidental slip or omission or administrative error on the part of the Tribunal or its staff. Judges should also be alive to the power conferred by section 9 of the 2007 Act, read in tandem with rules 25 and 26 of the 2005 Rules, to

review FtT decisions when an application for permission to appeal is received. Where a review is undertaken, the FtT is empowered to correct accidental errors in the decision or in a record thereof; or amend the reasons given for the decision; or set the decision aside: per section 9(4).

6. Given recent experience, it may be timely to formulate some general rules of practice. It is axiomatic that every application for permission to appeal to the Upper Tribunal should identify, clearly and with all necessary particulars, the error/s of law for which the moving party contends. This must be effected in terms which are recognisable and comprehensible. A properly compiled application for permission to appeal will convey at once to the Judge concerned the error/s of law said to have been committed. It should not be necessary for the permission Judge to hunt and mine in order to understand the basis and thrust of the application. While in some cases it will be possible for the permission Judge to engage in a degree of interpretation and/or making inferences for this purpose, this should never be assumed by the applicant and cannot operate as a substitute for a properly and thoroughly compiled application. These are elementary requirements and standards.

7. As ever in law context is, of course, everything. While high standards will always be expected of the representatives of a party applying for permission to appeal, some adjustment may be appropriate in the case of an unrepresented party. This is a reflection of both reality and individual context. The specific attention given to unrepresented parties in paragraph 10 of the Guidance Note is worth reproducing:

> *"Immigration Appellants are frequently unrepresented and in those circumstances it is necessary to read the decision appealed against with some care to ensure that an error of law is not revealed in the decision making, even if it is not one identified in the Appellants own grounds"*.

Moreover, as the Guidance Note expressly recognises (in paragraph 8), it is now established that in cases where life, limb or liberty is at stake or some other important human right is engaged, the approach of the higher courts has been to scrutinise anxiously the decision below. The Guidance Note also highlights cases involving rights under the EU treaties and the related secondary legislation, together with deportation appeals. There is also recognition that in some cases – which one would expect to constitute a small minority – a clear point may not be identified in the permission application by reason of lack of skill, knowledge or pressure of time. Thus there is a duty to consider points that are "Robinson obvious": R v Secretary of State for the Home Department, ex parte Robinson [1997] 3 WLR 1162. There is also power to consider any other point arising from the decision if the interests of justice so require: paragraph 9 of the Guidance Note.

8. FtT Judges, representatives and parties are also reminded of the decision of UTIAC in Ferrer (Limited Appeal Grounds; *Alvi*) [2012] UKUT 00304 (IAC), [22]-[32] especially, which contains some important

pronouncements and guidance on the grant of permission to appeal to UTIAC on limited grounds only. It also draws attention to the importance of two procedural notices: IA68 (FtT) and Form UT1 (UTIAC). It may be worth emphasising that, irrespective of whether permission to appeal is granted on all of the grounds advanced or some thereof only, a reasoned decision is always required in respect of each and every ground, which reinforces the necessity of considering all grounds with scrupulous care.

9. Finally, representatives should be aware that grounds of appeal presented in formulaic terms, particularly when they reappear with frequency in a multiplicity of cases over time, are likely to be received with circumspection. There can be no substitute for properly tailored and carefully crafted grounds of appeal which clearly reflect the unique facts, features and issues pertaining to the individual case. "Boilerplating" will be quickly recognised by permission Judges. *Ditto* makeweights and embellishments.

10. The application for permission to appeal in the present case did not satisfy the requirements and standards rehearsed above. It made no attempt to specify the error/s of law said to have been committed by the FtT. It employed the vague language of "*erred*", without more. This was inadequate and unacceptable. In principle, an error of law may take a number of forms. Inexhaustively, these include a failure to have regard to material evidence; taking into account and being influenced by immaterial evidence; inadequate reasons; unfair procedure; misunderstanding or misconstruction of the law; disregarding a relevant statutory provision; failing to give effect to a binding decision of a superior court; and irrationality. It should not be difficult for those who compile applications for permission to appeal to do so in terms which specify clearly and coherently, with appropriate particulars, the error/s of law said to contaminate the decision under challenge. Terms such as "*erred*" or "*erred in law*" or "*was wrong in law*" or "*misdirected itself in law*" are unacceptable unless accompanied by a clear specification of the error/s of law alleged and suitable brief particulars. If the application for permission fails to satisfy this standard and the Judge concerned is unable to identify with confidence the error/s of law asserted, the appropriate course will be a refusal.

11. One of the negative consequences of poorly compiled applications for permission to appeal is the inappropriate expenditure of judicial time in attempting to understand the basis and thrust of the application. This occurred in the present case, both in advance of the substantive hearing and at the hearing itself. Given the pressures on Tribunals to process large volumes of cases efficiently and expeditiously, in circumstances where there has been a notable recent increase in applications for permission to appeal to UTIAC, this is unacceptable. Furthermore, it is inimical to the overriding objective enshrined in rule 2(1) of the 2008 Rules. This provides, *inter alia*, that the Upper Tribunal must be enabled to process cases in a manner which avoids delay. Poorly compiled applications for permission to appeal can have other undesirable consequences. These include undermining the important value of legal

certainty and unfairness to the other party. Henceforth, applicants can expect unsatisfactory applications for permission to appeal to be dealt with brusquely and robustly.

12. The nebulous terms of the application for permission to appeal in the present case are reflected in the grant of permission. The former had a contagious effect on the latter. The Judge granted permission, firstly, on the ground that the FtT had arguably erred in law in its assessment of the credibility of three particular witnesses: see the second ground of appeal reproduced in [2] above. It may be observed that it will very rarely be appropriate to grant permission to appeal on this kind of ground. Credibility assessments by first instance fact finding Tribunals will normally be challengeable only on the basis of irrationality (or, as it is sometimes inelegantly termed, perversity): Edwards – v – Bairstow [1956] AC 14. Judges should be very slow to grant permission on such a ground. The second striking feature of the grant of permission is the statement:

> "*It is arguable that the Judge gave inadequate reasons for finding that the Appellant lived with his wife in a subsisting relationship*."

There was no contention in the application for permission that the FtT's determination was inadequately reasoned. Thus there was a mismatch between application and grant. It seems likely that the permission Judge was struggling to comprehend the application and was driven to this formulation in consequence. Finally, as regards the first ground of appeal, also quoted in [2] above, it is abundantly clear from the determination that the Judge had considered the emails from the local authority but, on perfectly rational and clearly explained grounds, declined to accord them any weight.

13. I announced my decision, with reasons, at the conclusion of the hearing. In brief summary, Mr Smart, representing the Secretary of State, accepted, realistically and correctly, that this is an irrationality challenge. The proportions of the hurdle thereby erected require no elaboration. I am satisfied that the findings and conclusions of the Judge were comfortably open to her, having regard to the documentary evidence (which I have considered) and the oral evidence of those who testified (summarised in the determination). It was plainly open to the Judge to make the omnibus finding that the Appellant and his spouse were living together in a genuine and subsisting relationship. There is no demonstrable error on the face of the determination. Furthermore, sufficient findings are rehearsed, while others can be readily inferred. No piece of material evidence was overlooked by the Judge. Fundamentally, the weight which the Judge determined to accord to certain aspects of the evidence, while attaching correspondingly little or no weight to others, lay comfortably within the bounds of the standard of rationality.

14. In my view, permission to appeal should not have been granted to the Secretary of State in this case. The application for permission fell measurably short of the governing threshold and invited a swift and summary refusal.

DECISION

15. I dismiss the appeal and affirm the decision of the FtT.

THE HON. MR JUSTICEMCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 24 July 2014