



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/09028/2014
IA/09006/2014
IA/09016/2014

THE IMMIGRATION ACTS

Heard at Field House
On 13th March 2015

Decision & Reasons Promulgated
On 26th March 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

WASIF QADEER BUTT (FIRST APPELLANT)
SHEEBA WASIF (SECOND APPELLANT)
HADIYAH WASIF (THIRD APPELLANT)
(ANONYMITY ORDER NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr A Pretzell of Counsel, instructed by A M B Advocates
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellants appeal against a decision of Judge of the First-tier Tribunal Ross promulgated on 30th September 2014.

2. The Appellants born 8th August 1981, 7th July 1981, and 13th February 2010 are citizens of Pakistan. The First and Second Appellants are husband and wife and are the parents of the Third Appellant.
3. On 22nd March 2013 the First Appellant applied for leave to remain in the United Kingdom as a Tier 1 (General) Migrant under the Points-Based System (PBS). The Second and Third Appellants applied for leave to remain as his dependants.
4. On 3rd February 2014 the applications were refused, and decisions made to remove the Appellants from the United Kingdom.
5. The First Appellant's application was refused with reference to paragraph 322(1A) and (2) of the Immigration Rules which I set out below;
 - (1A) where false representations have been made or false documents or information have been submitted (whether or not material to the application, and whether or not to the applicant's knowledge), or material facts have not been disclosed, in relation to the application or in order to obtain documents from the Secretary of State or a third party required in support of the application;
 - (2) the making of false representations or the failure to disclose any material fact for the purpose of obtaining leave to enter or a previous variation of leave or in order to obtain documents from the Secretary of State or a third party required in support of the application for leave to enter or a previous variation of leave;
6. In giving reasons for refusal the Respondent noted that in a previous application for leave to remain as a Tier 1 (General) Migrant submitted on 15th July 2010, the First Appellant had claimed £13,211 net profit from his self-employment as a Business and Management Consultant for the period 10th July 2009 to 9th July 2010.
7. The Respondent had conducted enquiries with HM Revenue and Customs (HMRC) and discovered that in the tax year between 1st April 2009 and 31st March 2010, the First Appellant had declared a net profit of £5,624, and between 1st April 2010 and 31st March 2011 a net profit of £453. No self-employment was submitted for the tax years ending in April 2012 and April 2013.
8. The Respondent noted that the earnings declared by the First Appellant to the Secretary of State differed from those declared to HMRC and concluded that the First Appellant had made false representations in his application for leave to remain in July 2010.
9. In the current application the First Appellant had claimed a net profit of £14,831 from self-employment during the period 16th March 2012 to 15th March 2013. Having regard to the fact that the First Appellant's declarations to HMRC did not corroborate his claimed earnings in his application for leave to remain in July 2010, the Respondent was satisfied that the First Appellant had made false representations in his current application.

10. Therefore his application was refused with reference to paragraph 322(1A) in relation to his current application, and paragraph 322(2) in relation to the representations he had made in his July 2010 application. Therefore no points were awarded under Appendix A for previous earnings.
11. The applications of the Second and Third Appellants were refused without the Respondent making a reference to any particular paragraph of the Immigration Rules, the inference being that the applications were refused because the First Appellant's application had been refused.
12. The appeals submitted by the Appellants were heard together and dismissed by Judge Ross (the judge) on 11th September 2014. In brief summary the judge found that the First Appellant accepted that false representations had been made in the July 2010 Tier 1 application, and found that the Respondent had satisfied the burden of proving that false representations were made, as this was not in dispute.
13. The Appellants had also relied upon Article 8 of the 1950 European Convention in their Grounds of Appeal. The judge found that to remove the Appellants from the United Kingdom as a family would not breach Article 8.
14. The Appellants applied for permission to appeal to the Upper Tribunal. In summary it was contended that the judge had erred in finding that the First Appellant had accepted making false representations in the 2010 application and had erred in finding that the burden of proof had been discharged by the Respondent.
15. It was contended that at no point had the First Appellant accepted that he had made false representations, and his case before the First-tier Tribunal was that the figures declared to HMRC differed from those declared to the Respondent, because of an error made by the First Appellant's accountant in submitting his tax return.
16. It was also contended that the judge had erred in making findings on matters that were not put to the First Appellant at the hearing and of which he had no prior notice, and paragraph 11 of the decision contained inadequate reasoning.
17. Permission to appeal was granted by Upper Tribunal Judge Perkins in the following terms;
 - "1. Whilst the Appellants might find it very hard to resist the Respondent's criticisms it is, I find, reasonably arguable that the First-tier Tribunal misunderstood fundamentally the First Appellant's case concerning which documents were wrong because of the alleged failings of his accountant.
 2. Further it is, I find, reasonably arguable that the First-tier Tribunal did not deal satisfactorily with paragraph 322(1A) requiring that an application be refused whereas refusal under paragraph 322(2) providing that an application should normally be refused.
 3. Each of the grounds may be argued but the Appellants must be astute to show how any error that is established is material."

18. Following the grant of permission the Respondent lodged a response pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008 contending, in summary, that the errors identified in the grounds of application were not material and that it was open to the judge to find that there were false representations made in the applications submitted to the Respondent in July 2010 and in March 2013.

The Upper Tribunal Hearing

Error of Law

19. Having heard submissions from Mr Pretzell who relied upon his skeleton argument dated 13th March 2015 in submitting that the First-tier Tribunal had erred in law, and from Mr Avery who relied upon the rule 24 response, in contending that the First-tier Tribunal had not materially erred, I decided that the judge had erred in law and the decision of the First-tier Tribunal must be set aside.
20. I found that the judge erred in paragraph 9 in finding that the First Appellant accepted that false representations were made in the July 2010 Tier 1 application. The First Appellant had not disputed that different figures regarding his self-employment had been provided to HMRC, and to the Secretary of State. This did not mean that the First Appellant accepted that a false representation, which entailed dishonesty, had been made to the Secretary of State. The explanation for the discrepancy in the figures was that the First Appellant's accountant had not included all of his income in his tax return. I did not find any evidence to substantiate the finding that the First Appellant accepted that a false representation had been made to the Secretary of State in relation to the July 2010 application.
21. I found that the judge erred in paragraph 12 of the decision, which is set out below;
 - "12. The burden is on the Respondent to prove that false representations were made, which I find is satisfied given that it is not in dispute. The Appellant has not provided any evidence from his accountants that there was a mistake or that he was unaware of the accountant's mistake. In any event, the Tier 1 form in 2010 was completed by the Appellant and I find that he must have known that the claimed earnings differed considerably from his tax return figures."
22. In my view the judge repeats the error made in paragraph 9 by stating that it was not in dispute that false representations were made. The evidence indicates that this was very much in dispute. It is not clear whether the judge is making a finding in relation to the March 2013 application in this paragraph. It is the March 2013 application that is the subject of the refusal pursuant to paragraph 322(1A). The judge finds that false representations were made, but it is not clear that this finding relates to the March 2013 application as well as the July 2010 application. If the finding does relate to the March 2013 application, then the finding is inadequately reasoned as it is not clear why the judge has reached that conclusion.

23. Having set aside the decision of the First-tier Tribunal, both representatives indicated that they were in a position to proceed so that the decision could be re-made by the Upper Tribunal.

Re-Making the Decision

Evidence

24. The First Appellant adopted his witness statement dated 5th September 2014. He was questioned by both representatives and I have recorded all questions and answers in my Record of Proceedings and it is not necessary to reiterate them here. In brief summary the First Appellant confirmed that the income from his self-employment which was provided to the Secretary of State in the applications made in July 2010 and March 2013 was correct. He explained that he had provided evidence with his applications to support the figures. In relation to the July 2010 application he only became aware of the discrepancy between the income provided to HMRC, and the income provided to the Respondent when he received the Respondent's decision to refuse his current application, which is dated 3rd February 2014.
25. The First Appellant then went to speak with the accountant that had prepared his earlier tax return and discovered that his accountant had failed to take into account invoices for the period between April 2010 and July 2010, and therefore there had been an under declaration of his income to HMRC. He then changed accountants and stated that his new accountants had remedied the under declaration made to HMRC.

The Respondent's Submissions

26. Mr Avery confirmed that the only issue to be decided related to the contention that the First Appellant had used false representations in the two applications that he had made to the Respondent for leave to remain in the United Kingdom. The appeals of the Second and Third Appellants depended upon the result of the First Appellant's appeal.
27. Mr Avery relied upon the reasons given in the Respondent's decision dated 3rd February 2014. I was asked to note the discrepancy between the figures submitted on behalf of the First Appellant to HMRC, and those submitted to the Respondent.
28. Mr Avery pointed out that the First Appellant had blamed his accountant, but there was no satisfactory evidence that he had made any formal complaint against the accountant.
29. Mr Avery made no submissions on Article 8, as it had been agreed that there had been no challenge to the Article 8 findings made by the First-tier Tribunal, and therefore those findings must stand.

The Appellants' Submissions

30. Mr Pretzell relied upon the skeleton argument. He submitted that paragraph 6A of Appendix C set out what documentation needed to be provided with an application for leave to remain as a Tier 1 (General) Migrant in relation to self-employment. There was no requirement that any documentation from HMRC should be submitted.
31. It was accepted that different information in relation to self-employed earnings had been given to HMRC and the Respondent. Put simply that did not amount to the First Appellant making a false representation to the Respondent. The Respondent had not proved that false representations had been made, and therefore the appeals must be allowed.
32. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

33. The only issues before me related to paragraph 322(1A) which if made out is a mandatory refusal, and 322 (2) which is a discretionary refusal. The burden of proof is on the Respondent. I take into account that the Court of Appeal in AA (Nigeria) [2010] EWCA Civ 773 when considering paragraph 322(1A) stated in paragraph 76;

“Dishonesty or deception is needed, albeit not necessarily that of the applicant himself, to render a ‘false representation’ a ground for mandatory refusal.”

34. It is accepted that different figures in relation to previous self-employed earnings were submitted to HMRC, when compared with those submitted to the Respondent. I have considered the HMRC figures which are set out in a witness statement prepared by W Gilbert dated 30th August 2013.
35. The First Appellant has explained that his accountant was at fault in submitting his tax return. No further evidence has been submitted by the Respondent. I accept the First Appellant's evidence on this issue.
36. The Respondent's case rests on the fact that different figures have been provided to HMRC than were provided to the Respondent. The Respondent has not submitted sufficient evidence to discharge the burden of proof, and has not proved that the figures submitted to the Respondent are false or that any dishonesty or deception has been carried out.
37. I agree with Mr Pretzell's succinct submission, that although the figures differ, insufficient evidence has been submitted to prove the figures submitted to the Respondent in the applications made in July 2010 and March 2013 amount to false representations. The evidence submitted by the Respondent does not prove that the First Appellant has submitted any documents with his applications for leave to

remain, that are false. The fact that different figures were submitted to HMRC when compared with those submitted to the Respondent is not without more, proof that false representations have been made to the Respondent.

38. As the burden of proof has not been discharged the appeal of the First Appellant must be allowed. This means that the appeals of the Second and Third Appellants are also allowed.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law and was set aside.

I substitute a fresh decision.

The appeals are allowed under the Immigration Rules.

Anonymity

The First-tier Tribunal made no anonymity direction. There has been no request for anonymity and I see no reason to make an anonymity order.

Signed

Date 17th March 2015

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT FEE AWARD

As the appeals are allowed I have considered whether to make a fee award. I do not consider it appropriate. The appeals have been allowed after hearing evidence which was not made available to the original decision maker.

Signed

Date 17th March 2015

Deputy Upper Tribunal Judge M A Hall