Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/00106/2019
HU/02603/2019

THE IMMIGRATION ACTS

Heard at Field House
On 17 December 2019

Decision & Reasons Promulgated
On 30 December 2019

Before

UPPER TRIBUNAL JUDGE BLUM

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RAJA WAQAR ASGHAR
SABA MARYUM
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:
For the Appellant: Ms K Everett, Senior Home Office Presenting Officer
For the Respondent: Mr A Slatter, Counsel, instructed by Thamina Solicitors

DECISION AND REASONS

1. The Secretary of State for the Home Department (appellant) appeals against the decision of Judge of the First-tier Tribunal Easterman (the judge), promulgated on 21 June 2019, allowing the joint appeals of Mr Asghar and Mrs Maryum (the respondents) against the appellant's decision dated 10 December 2018 refusing their human rights claims.

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Background

2. The respondents are both nationals of Pakistan. The 1st respondent was born on 20 July 1980 and the 2nd respondent was born on 9 April 1989. They are married. At the date of the First-tier Tribunal decision they had a 4-year-old child and a one-month old child. The 1st respondent entered the UK in 2007 and was granted further periods of leave, the last period being valid until 11 October 2016. The 2nd respondent entered the UK in 2014 after having been granted leave as a PBS dependent spouse. The 1st respondent made an application on 23 September 2016 for further leave to remain as a Tier 1 (General) Migrant, and this was varied on 23 August 2017 to an application for Indefinite Leave to Remain (ILR) based on long residence. The 2nd respondent made an application as a dependent of the 1st respondent. It was agreed before the First-tier Tribunal that the position of the 2nd respondent was dependent on that of the 1st respondent. There was no issue taken with this approach by the Presenting Officer at the 'error of law' hearing before the Upper Tribunal.

3. The appellant refused the ILR application based on disparities between the figures supplied by the 1st respondent relating to his dividend income from his company RWA Software Development & IT Consultancy Services Ltd (the company). In 2011 the 1st respondent made an application for further leave to remain on the basis, inter alia, that he earned £26,000 as a dividend income from his company between the period 9 February 2010 to 10 February 2011. Although the Secretary of State refused his application, the 1st respondent successfully appealed that decision before Judge of the First-tier Tribunal Fletcher-Hill later that year. Judge Fletcher-Hill found that the 1st respondent was a credible witness and that he had earned a dividend income of £26,000. No tax return was filed by the 1st respondent for the years 2009/2010. The 1st respondent's 2010/2011 tax return showing a dividend income of £25,555 was not filed until 15 October 2015. As a result of the late declared dividend income the 1st respondent was required to pay approximately £575 tax plus interest. The appellant considered that the 1st respondent had acted in a dishonest manner by under declaring his income to HMRC and exercised her discretion under paragraph 322(5) of the immigration rules to refuse his application for ILR on the basis that it was undesirable to permit the 1st respondent to remain in the UK in light of his conduct and character. As the 1st respondent's application was refused, the 2nd respondent's application also felt to be refused. The respondents each appealed the appellant's decision pursuant to s.82 of the Nationality, Immigration and Asylum Act 2002.

The decision of the First-tier Tribunal

4. The judge heard oral evidence from the 1st respondent and considered a bundle of documents provided on the respondents' behalf. From [16] to [38] of his decision the judge set out the respondents' case and arguments, including the evidence given by the 1st respondent at the hearing. From [39] to [47] the judge set out the appellant's case and arguments. The respondent's case was, in

essence, that whilst he had been careless in his tax affairs, he had not been dishonest. He relied on an accountant to prepare his tax returns for the relevant years and had not appreciated that his dividend income had not been disclosed. He did not have knowledge of the UK taxation system at the time and put his trust in his accountant. His father died in November 2011 and the 1st respondent went to Pakistan and he may have missed the dividend income in his tax return as a result. The 1st respondent's company had paid £6,000 in corporation tax at the relevant time and there had been no other issue raised in respect of any of his other tax returns.

5. In the section of his decision entitled 'Findings of Fact and Conclusions' the judge engaged with concerns raised by the Presenting Officer relating to whether the 1st respondent's use of other accountants and the email address provided by the accountant who lodged his tax returns. The judge expressed some concern as to what had caused the 1st respondent or his accountant to realise in 2015 that there had been a previous under declaration of income, and referred to concerns raised by the Presenting Officer in respect of the death of the 1st respondent's father. The judge found it troubling that the 1st respondent had signed off his under declared tax return a relatively short while after the previous First-tier Tribunal hearing in which he had to prove his income. At [61] the judge noted however that the appellant had been found credible by Judge Fletcher-Hill, and the judge accepted Counsel's comments that the 1st respondent had consistently declared the correct amounts paid tax in respect of all his other tax years. At [62] the judge reminded himself that the burden rested on the appellant to show on balance that the 1st respondent had been dishonest. The judge noted that, although the Presenting Officer had raised a number of perfectly fair points, overall, when looking at the points made on both sides, he was not satisfied that the 1st respondent was dishonest, although it was "a very close-one thing." The appeals were both allowed.

The challenge to the First-tier Tribunal's decision

6. The short grounds contend that it was "odd" for the judge to have relied on a previous judicial finding that the 1st respondent was credible given the problems he identified with the 1st respondent's evidence. The grounds stated,

> "It is respectively submitted that although the Tribunals were looking at the same evidence, in the same circumstances we didn't know about the evidence at that point of the 1st hearing. Therefore the information was not available to previous Judge [*sic*]. Therefore different credibility findings on the 1st hearing would not have been made. It is submitted on that basis the FTTJ has misapplied Devaseelan. Which is an error in law."

7. The grounds are poorly phrased and difficult to understand. They suggest that the judge adopted the **Devaseelan v SSHD** [2002] UKIAT 00702 principles and approached the earlier decision by Judge Fletcher-Hill as his starting point. This is despite the fact that the judge made no mention of **Devaseelan** or that he approached the decision of Judge Fletcher-Hill as his starting point, and that the

issue before Judge Fletcher-Hill was whether he received his dividend income and not whether disclosed his income to HMRC.

8. The grant of permission was nevertheless made on the basis that it was arguable that **Devaseelan** had not been applied correctly by the judge. There was no application by the appellant to amend her grounds at any stage.

9. At the 'error of law' decision the appellant was ably represented by Ms Everett. Ms Everett at once appreciated the difficulties with the basis upon which the appellant sought to appeal the judge's decision. Both the grounds of appeal and the grant of permission to appeal were erroneously premised on the judge regarding the decision of Judge Fletcher-Hill, including Judge Fletcher-Hill's credibility findings as his starting point in accordance with the **Devaseelan** principles. In these circumstances Ms Everett did not advance any further argument in support of the grounds. I indicated that I did not need to hear from Mr Slatter and that I would dismiss the appeal.

Discussion

10. It is readily apparent from the judge's decision that he did not feel himself bound by the positive credibility findings of Judge Fletcher-Hill in the sense that he had to approach those findings as his starting point by reference to the principles established in **Devaseelan**. At no point does the judge refer to **Devaseelan** or the principles established by that case. Nor can it be said, considering the judge's decision in a holistic manner, that he has, by necessary implication, approached the earlier judicial decision on **Devaseelan** principles. The judge carefully considered the arguments advanced by the Presenting Officer and accepted that some of the points were fairly made but was ultimately unconvinced that the 1st respondent had been dishonest. In reaching this conclusion the judge took into account, as one relevant factor, the fact that a previous judge found the 1st respondent to be credible. The judge was rationally entitled to take this into account as a relevant factor. The judge did not regard the previous credibility finding as being determinative in any way, nor did he attach disproportionate weight to the previous credibility finding. It was simply one of the factors upon which the judge relied in concluding that the appellant failed to discharge the burden incumbent on her to demonstrate that the 1st respondent had been dishonest. The judge additionally took into account, inter alia, the fact that the appellant had otherwise consistently declared the correct amounts owed to HMRC and paid tax thereon. The judge had also noted that the 1st respondent's company had, at the relevant time, paid corporation tax of £6000. The judge properly directed himself in accordance with the appropriate standard and burden of proof. His decision, whilst on one view generous, was supported by adequate reasoning and was one rationally open to him on the evidence before him.

11. For the reasons given above I am not satisfied that the judge has erred on a point of law such as to require his decision to be set aside.

Notice of Decision

The appeal by the Secretary of State for the Home Department is dismissed.

D. Blum

Signed Date 20 December 2019
Upper Tribunal Judge Blum