Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/04721/2018
HU/09575/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 January 2019	**On 20 February 2019**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS FARAH BASHIR
MR MUHAMMAD ADNAN
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:
For the Appellant: Mr L Tarlow, Home Office Presenting Officer
For the Respondents: Mr J Dhanji, Counsel instructed by ATM Law Solicitors

DECISION AND REASONS

1. The appellant, the Secretary of State (hereafter the SSHD), has permission to challenge the decision of Judge Hembrough posted on 16 October 2018 allowing the appeal of the respondents (hereafter the claimants who are husband and wife of Pakistani nationality, against the decisions made by the appellant on 30 January 2018 and 7 April 2018 refusing them leave to remain.

2. The first claimant's application was refused under paragraph 276(ii) and (iii) with reference to the general grounds of refusal under paragraph 322(5) of the Immigration Rules. The main concern of the SSHD was that following UKVI requesting the first claimant in April 2017 to complete a tax questionnaire, it had come to light that whereas in the tax year 2010/11 the first claimant had declared £14,043 as income, when applying for Tier 1 (General) leave to remain in March 2011, she had claimed £42,133 from all sources. For the tax year 2012/13 there was a similarly significant discrepancy (£21,833 being declared to HMRC and (in June 2013) £50,778 being claimed for June 2012 – June 2013).

3. Whilst of the view that the SSHD's allegations concerning 2012/13 were "misconceived" (paragraph 26), the judge was clearly unimpressed by the first claimant's explanation for the discrepancies in relation to tax year 2011/2012, concluding at paragraphs 25 and 27:

> "25. In the end it comes down to this 'was the first Appellant dishonest or careless?' The burden of proving dishonestly lies with the Respondent. Looking at the evidence before me in the round I cannot but conclude that the first Appellant deliberately closed her eyes to the obvious for the purpose of gaining a tax advantage and was thus dishonest and that this is conduct which potentially engages paragraph 322(5) for the reasons given above.
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> ...
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> 27. It follows from my above findings that the first Appellant's application potentially fell to be refused under paragraph 276(ii) and (iii) with reference to the general grounds for refusal under paragraph 322(5) of the Immigration Rules."

4. However, the judge went on to allow the appeal on Article 8 grounds.

5. The SSHD's grounds allege a (a) failure to make clear findings on the paragraph 322(5) issues; and (b) a failure to factor in the first claimant's deception into the proportionality assessment. The SSHD also contends that he was also entitled to refuse the claimant's application under paragraphs 276(ii) and (iii).

6. I received succinct submissions from Mr Tarlow and Mr Dhanji. Mr Dhanji's submissions broadly amplified those set out in a Rule 24 response. There was a discussion with both regarding the purport of what the judge stated at paragraphs 27–28:

> "27. It follows from my above findings that the first Appellant's application potentially fell to be refused under paragraph 276(ii) and (iii) with reference to the general grounds for refusal under paragraph 322(5) of the Immigration Rules.
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> 28. Paragraph 322(5) is a discretionary ground of refusal. Whilst I cannot exercise the Respondent's discretion this is clearly relevant as regards the issue of proportionality when considering Article 8 ECHR."

7. Mr Tarlow said this showed that the judge had failed to make proper findings under the Rules both because he only found that the first claimant's application "potentially" fell under paragraph 322(5) and because he had not exercised the paragraph 322(5) discretion. Mr Dhanji said that I should read these two paragraphs together as showing that the judge made firm findings on the substantive contents of paragraph 322(5) and only refrained from exercising discretion, justifiably leaving that to be addressed in the wider proportionality assessment.

8. I have no hesitation in upholding the SSHD's grounds. Whatever the judge meant in paragraphs 25 and 27 by stating that the first claimant's conduct "potentially" fell under paragraph 322(5), it was plain that he considered she had used dishonesty. Thus in paragraph 25 he described her as "deliberately clos[ing] her eyes to the obvious for the purpose of gaining a tax advantage and was thus dishonest …"and at paragraph 35 saying she was not a "serial offender" that was with "one exception".

9. I cannot accept Mr Dhanji's submission that the judge effectively decided the first claimant did not actually fall under paragraph 322(5) because he did not think that was justified on a discretionary basis. At paragraph 28 the judge said "I cannot exercise the respondent's discretion". That is not only a clear statement that the judge did not exercise the discretion but a clear demonstration that the judge failed to understand that, having found the first claimant had been dishonest, it remained incumbent on him to decide whether to apply paragraph 322(5) as this provision incorporates a discretion. Nor can I accept Mr Dhanji's suggestion that somehow the judge's assessment of proportionality doubles as an exercise of the paragraph 322(5) discretion in favour of the first claimant. For if that were the case the judge's assessment of proportionality would have had to make clear that the first claimant could be taken to have met the requirements of the Rules, thereby reducing the weight of the public interest. The judge's conclusion at paragraph 37 that:

> "… looking at matters in the round I find that this is a rare case where the private lives of the [claimants] and their child outweigh the public interest in their removal"

gives no clue as to any position taken as regards conformity with the Rules.

10. I consider that the judge's assessment was therefore vitiated by legal error necessitating that I set aside his decision.

11. Both representatives urged that if I set aside the judge's decision I should remit it to the FtT. I am unable to agree. There was no challenge made by the SSHD to the judge's findings of fact. Nor did the claimant's responses to the decision of the FtT judge to dispute any of the judge's findings of fact. As Mr Dhanji conceded, those findings included that the first claimant had used dishonesty in undercharging earnings in the tax year 2010/2011 by over £25,000. In order for me to re-make the decision, all that is required now is for a fresh judicial evaluation of the undisputed facts. The claimant's representatives have not sought to adduce any further evidence.

12. As regards the first claimant's case under the Rules, I am satisfied firstly that her dishonesty in relation to her 2010/11 tax return was conduct falling within the terms of paragraph 322(5). Further, I consider that the SSHD was fully entitled to exercise his discretion by concluding that paragraph 322(5) was to be applied as a general ground of refusal. The amount involved was considerable. Even though the first claimant took steps to repay this amount, this was only done as a result of the UKVI questionnaire, which required such information to be provided and when it was essential to the first claimant's current application for leave to remain that she could show she had taken steps to rectify matters. I accept that this was the only time she used dishonesty and that since 2008 she had established two businesses and also been employed. However, none of these or other circumstances relating to her personal, professional and family life lead me to consider that the paragraph 322(5) discretion should have been exercised differently than it was by the SSHD.

13. Given that the claimants were unable to meet the requirements of the Rules, they can only succeed in their appeals if able to show that there exist compelling circumstances for allowing their appeals on Article 8 grounds outside the Rules.

14. In favour of the claimants are the factors I have already mentioned, together with other matters set out by the judge at paragraphs 31 and 36:

> "31. On the other hand a strong private life has been established in the UK in the expectation on the part of both Appellants that they would be granted indefinite leave to remain after the first Appellant had accrued 10 years lawful residence.
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> ...
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> 36. The financial evidence submitted at the time of both applications showed that the first Appellant was earning in excess of £40,000 per annum thus indicating that she was able to meet the minimum income requirement of Appendix FM in respect of both her husband and her child."

15. However, I do not consider that these circumstances constitute compelling circumstances as they are significantly outweighed by a number of factors: that both claimants are highly qualified people who would have no difficulty in obtaining work in Pakistan and so would be able to maintain themselves to a satisfactory standard; that the second claimant has qualifications in banking; that the couple have family living in Pakistan; that whilst they have resided continuously in the UK since 2006 and done so at all times resided lawfully (see paragraph 2), neither has ever had any expectation that they would be entitled to ILR and have only ever been in receipt of limited leave under the student and Tier 1 (General Migrant) scheme - and accordingly I attach little weight to their private life. The couple's child, being born in July 2015, is still a very young child and there is nothing in the evidence to indicate that his best interests lie anywhere else than in returning with his parents, wherever they are allowed to live.

16. To this point the factors I have identified as counting against the claimants are virtually the same as those weighed against them by the FtT Judge (see paragraphs

30 and 33). However there is a further factor, namely the fact that the reason why the claimants could not meet the requirements of the Rules was because of dishonesty on the part of the first claimant involving some £25,000. Failure based on such conduct means that very considerable weight has to be attached to the public interest (in the claimants' case this involves more than what the FtT Judge at paragraph 37 described as "the public interest in immigration control"). In addition, I note that there were no health problems claimed by either claimant. Taking into account the claimants' failure to meet the Rules and the particular reason for this, I am satisfied that the decision of the SSHD to refuse leave to remain did not amount to a disproportionate interference with the claimants' private and family lives. Accordingly I dismiss the claimants' appeals.

17. To conclude:

The decision of the FtT Judge has been set aside for material error of law.

The decision I re-make is to dismiss the claimants' appeals.

No anonymity direction is made.

Signed Date: 19 February 2019

H H Storey

Dr H H Storey
Judge of the Upper Tribunal