



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/10768/2018
HU/10730/2018

THE IMMIGRATION ACTS

Heard at Field House
On 21 March 2019

Decision & Reasons Promulgated
On 4 April 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

FUAWAD [B]
AND
AYSHA [B]
(ANONYMITY DIRECTION NOT MADE)

Appellants

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Harvey of Counsel instructed by AY & J Solicitors
For the Respondent: Mr N Bramble of the Specialist Appeals Team

DECISION AND REASONS

The Appellants

1. The Appellants are husband and wife. They have two minor children born in 2015 and 2018. The Appellants are Indian citizens, born respectively on 30 November 1982 and 20 August 1990.

2. On 9 September 2007 the husband entered the United Kingdom with entry clearance as a student. He was granted further leave as a Tier (Post-Study Worker) migrant and subsequently granted further leave as a Tier 1 (General) migrant which was extended to expire on 13 June 2016.
3. The Appellants married on 8 December 2012 in India and the wife entered on 10 August 2013 under the Points-Based Scheme as the husband's dependant. Both children were born in the United Kingdom.
4. On 10 June 2016 the husband applied for indefinite leave to remain as a Tier 1 (General) migrant and three days later the wife applied for leave as his dependant.

The SSHD's decisions

5. The Respondent (the SSHD) refused the husband's application on 7 April 2018 by reference to paragraphs 276B and 322(5) of the Immigration Rules and the wife's application on 30 April 2018 under paragraph 276ADE(1) and Appendix FM, surprisingly without reference to the refusal of the husband's application.
6. The SSHD noted that the husband's tax returns showed that he had reported to HM Revenue & Customs an income for the tax year ending 5 April 2011 lower than he had declared in his application of 4 April 2011 to the SSHD for further leave. This led the SSHD to conclude the husband had been deceitful and dishonest in his dealings with HMRC or the SSHD or both which indicated character or conduct making it undesirable to grant him indefinite leave to remain.
7. The SSHD came to this conclusion because for the year ending 5 April 2011 the Applicant had submitted a tax return showing a total income of £16,665 which was significantly lower than the earnings of £36,346 claimed in his application of 04 April 2011 for further leave under the Points-Based System.

Proceedings in the First-tier Tribunal

8. The Appellants appealed and by a decision promulgated on 27 December 2018 Judge of the First-tier Tribunal Rhys-Davies dismissed both appeals on all grounds.
9. The Appellants sought permission to appeal on the basis the Judge had erred in law. The grounds referred to the explanation of dishonesty in the judgment in *R (Khan) v SSHD [2018] UKUT 384 (IAC)*. The Judge was said to have found the husband's explanation plausible and to have not taken adequately into account that the husband had amended his tax return and paid the additional tax due. The Judge had not made an express finding the husband had been dishonest.
10. The grounds argue the Judge had erred in rejecting the husband's explanation partly because he had not produced bank statements from January 2012, had not adequately taken into account the husband's account of when he had been depressed and that the wife had not been in a position to vouch for the relevant period because

it was in part prior to their marriage and for a period before she had joined him in the United Kingdom.

11. The Judge had found it plausible the husband may have been a victim of fraud in relation to his first tax return and had thereafter speculated as to his future behaviour at paragraph 68 of his decision.

The Upper Tribunal Proceedings

12. The Appellants renewed their permission applications on similar grounds to the Upper Tribunal. On 26 February 2019 Upper Tribunal Judge Hemingway granted permission because it was arguable that the Judge had erred in his understanding of the relationship of the periods when the husband stated that he was suffering from depression and when he dealt with his tax return and further leave application.
13. The Appellants and their younger child attended. I explained the purpose and procedure to be adopted at an Error of Law hearing and the Appellants took no active part in the hearing.
14. The Response given pursuant to Procedure Rule 24 by the SSHD asserted the First-tier Tribunal Judge having accepted the plausibility of the husband's account to have been an innocent victim, nevertheless went on to find there were factors that undermined the plausibility of the account and was justified in his adverse credibility findings. There had been a lack of satisfactory medical evidence to corroborate the husband's claims to have had mental health issues since 2011 and the Judge had found the evidence of each of the Appellants about these issues to be inconsistent. The Judge had been justified in his conclusions.

Submissions for the Appellants

15. Ms Harvey stated she was not relying on all the grounds for appeal. She referred to the headnote to *R (Khan)* and submitted the Judge's findings of fact did not justify his conclusion that the husband had been dishonest. With reference to the payments to his first tax adviser to whom it was alleged had ill-served him, the husband had not been requested by his advisers to produce evidence by way of bank statements of payment to the tax adviser.
16. The evidence was the husband had been depressed since January 2012. He had married on 8 December 2012. It was an arranged marriage. The wife would not have been in a position to know and understand her husband's mental issues until she had joined him in August 2013. There had been no dishonesty in relation to his mental issues.
17. The Judge's comments at paragraph 68 of his decision were speculative and unsupported by any adequate reasoning.
18. The application of paragraph 322(5) require the exercise of discretion which the Judge had not considered. His decision was flawed and should be set aside.

19. I noted to Ms Harvey that there had been no application for the submission of further evidence. She informed me the husband had applied for a copy of his GP records but further time was required to obtain the full records and the husband had not made any applications for the missing bank statements from 2012.

Submissions for the SSHD

20. Mr Bramble relied on the response given under Procedure Rule 24. The grounds for appeal which had been pursued all related to a challenge to the Judge's treatment of the husband's evidence. It was notable that no application had been made to submit further evidence.
21. The Judge had been entitled to rely on the failure to produce the bank statements which could have supported the husband's claim to have withdrawn cash to pay the first accountant by whom he had been ill-served. The statements had not been produced for the hearing in the Upper Tribunal. This was hardly a new issue as indeed the Judge had specifically commented on their absence and they would be evidence to support what the husband had claimed. Much the same could be said in relation to the absence of the husband's notes held by his GP referred to at paragraphs 41 and 72 of the Judge's decision.
22. The letter at Section G of the SSHD's bundle from Dr Ravani was retrospective, confirming treatment from 02 July 2013 to 02 May 2015. I noted that the copies of the prescriptions issued by Dr Ravani were dated to July and October 2014.
23. The husband's mental health issues were a central plank of his explanation how the error in his tax return arose, as set out at paragraph 13 of the skeleton argument before the Judge. The same paragraph referred to the payments to the first accountant. The Judge had adopted the correct approach to the application of the learning in *R(Khan)*: the husband's innocent explanation did not satisfy the relevant test which the Judge had identified at paragraph 63 of his decision.
24. The grounds for appeal referred to the exercise of discretion in the application of paragraph 322(5) as part of the challenge to the Judge's proportionality assessment. The Judge had assessed proportionality at paragraphs 89-92 of his decision which should be upheld.

Response for the Appellants

25. Ms Harvey stated she had been instructed that the first accountant had been paid in cash which had been withdrawn from the bank over a period of time and that the relevant bank statements could be submitted.
26. The husband had probably been in India in 2014 and so it was reasonable that the evidence of Dr Nirvani should date from then. The Judge had erred at paragraph 74 in relying on apparently inconsistent evidence given by the wife about the husband's mental health issues to make an adverse credibility finding, given the timing of the relevant application for further leave and filing of 2010/11 tax return.

27. The Judge had failed to consider the exercise of discretion at paragraph 76 of his decision. The decision should be set aside.

Consideration

28. I find the Judge did not give adequate reasoning at paragraphs 74 and 75 of his decision to support his adverse credibility finding in respect of the husband because of the wife's evidence (or lack of it) about his mental issues prior to their marriage or her arrival in the United Kingdom. I also find that paragraph 75 adds little to the decision other than speculation intended to support an adverse credibility finding. This is so particularly in the light of the Judge's findings about the plausibility of the husband's account.
29. For these reasons, I find the Judge's decision contains a material error of law such that it should be set aside. At the hearing the parties agreed that if I found there was an error of law in the decision I might proceed to deal with the substantive appeal in this decision.
30. The burden of proof is on the Appellants and the standard of proof is the civil standard; that is on the balance of probabilities. Evidence subsequent to the date of decision may be taken into account. Where fraud or deceit is alleged by the SSHD, the initial burden of proof is on the SSHD.
31. I am satisfied the SSHD has discharge the evidential burden of proof by reason of the differences in the income for 2010/11 which the husband declared in his application for further leave of 4 April 2011 and his 2010/11 tax return filed in January 2012 and amended not long before his application for indefinite leave leading to the decision under appeal.
32. The Appellants knew from the reasons for refusal of the husband's application that the SSHD had concerns about both the incomes declared in the indefinite leave application and in the 2011 tax return. There is no evidence to confirm the income disclosed in the indefinite leave application of 4 April 2011. The husband has accepted that the 2011 tax return was inaccurate. He seeks to explain this by alleging that he was defrauded by his then accountant. He claimed he had withdrawn in or about January 2012 in a single transaction a sum of at least £5490 to pay the accountant and meet his tax liability: see paragraph 7 of the husband's statement of 7 November 2018.. There is no documentary evidence to support this explanation which is one of the two central planks of the husband's appeal. At the hearing before me, his Counsel reported that his instructions were that the cash withdrawals to pay this accountant had been made over a period of time.
33. I refer to the tax calculation summary of 8 June 2016 issued by HMRC at Section F of the SSHD's bundle. The husband on one version states he paid his then accountant in January 2012 £5490. The tax due for which that money was supposed to be paid remained outstanding from January 2012 until after June 2016. The husband has given no explanation how he remained unaware that the tax due on his 2011 tax return remained outstanding for more than four years without the husband receiving

some communication from HMRC about a failure to lodge a tax return or demand for payment of tax. If he had been defrauded, there was no explanation why the only evidence of police involvement is an e-mail of 22 October 2017 (some five years after the claimed loss of £5490) from the police referred to in Section B of the Appellant's bundle but despite reference to it in the index to the bundle it is not to be found. It is not unreasonable to have expected more energy to have been spent by the husband even if he was under stress and depressed in pursuing a not inconsiderable sum of money of which he claimed to have been defrauded.

33. The second central plank of the appeal is the husband's claimed depression and stress which started in 2010 and was continuing at the time of the preparation and filing of the 2011 tax return in January 2012. Other than mere assertion and evidence of medical treatment from 9 July 2013, some one and a half years after the 2011 tax return had been filed, there was no evidence to support the claim. The absence of evidence was explained by reference to difficulties in obtaining the GP's records. The husband had relied on his mental health issues since 16 May 2017 when interviewed: see Section H of the SSHD's bundle at reply 34. He has had ample time to obtain the requisite corroborative evidence. For the sake of completeness, I should add that the Appellant's bundle contains in addition to Dr Nirvani's letter and prescription correspondence from Dr Quadir Quraishi in the form of two letters both dated 1 June 2016 referring to treatment for enteric fever (Typhoon) for the period 25 November 2013-20 January 2014 with an accompanying medical certificate issued by Dr A Tungekar for a not dissimilar period.
34. I refer to the guidance given at paragraph 37 of *R (Khan)*:
- (i) Where there has been a significant difference between the income claimed in a previous application for leave to remain and the income declared to HMRC, the Secretary of State is entitled to draw an inference that the Applicant has been deceitful or dishonest and therefore he should be refused ILR within paragraph 322(5) of the Immigration Rules. I would expect the Secretary of State to draw that inference where there is no plausible explanation for the discrepancy.
 - (ii) However, where an Applicant has presented evidence to show that, despite the prima facie inference, he was not in fact dishonest but only careless, then the Secretary of State is presented with a fact-finding task: she must decide whether the explanation and evidence is sufficient, in her view, to displace the prima facie inference of deceit/dishonesty.
 - (iii) In approaching that fact-finding task, the Secretary of State should remind herself that, although the standard of proof is the "balance of probability", a finding that a person has been deceitful and dishonest in relation to his tax affairs with the consequence that he is denied settlement in this country is a very serious finding with serious consequences.
 - (iv) However, for an applicant simply to blame his or her accountant for an "error" in relation to the historical tax return will not be the end of the matter: far from it. Thus, the Secretary of State is entitled to take into account that, even where an accountant has made an error, the accountant will or should have asked the tax payer to confirm that the return was accurate and to have signed the tax return, and furthermore the Applicant will have known of his or her

earnings and will have expected to pay tax thereon. If, realising this (or wilfully shutting his eyes to the situation), the Applicant has not taken steps within a reasonable time to remedy the situation, the Secretary of State may be entitled to conclude either that the error was not simply the fault of the accountant or, alternatively, the Applicant's failure to remedy the situation itself justifies a conclusion that he has been deceitful or dishonest and therefore he should be refused ILR within paragraph 322(5) of the Immigration Rules.

(v) Where an issue arises as to whether an error in relation to a tax return has been dishonest or merely careless, the Secretary of State is obliged to consider the evidence pointing in each direction and, in her decision, justify her conclusion by reference to that evidence. In those circumstances, as long as the reasoning is rational and the evidence has been properly considered, the decision of the Secretary of State cannot be impugned.

(vi) There will be legitimate questions for the Secretary of State to consider in reaching her decision in these cases, including (but these are by no means exclusive):

- i. Whether the explanation for the error by the accountant is plausible;
- ii. Whether the documentation which can be assumed to exist (for example, correspondence between the Applicant and his accountant at the time of the tax return) has been disclosed or there is a plausible explanation for why it is missing;
- iii. Why the Applicant did not realise that an error had been made because his liability to pay tax was less than he should have expected;
- iv. Whether, at any stage, the Applicant has taken steps to remedy the situation and, if so, when those steps were taken and the explanation for any significant delay.

(vii) In relation to any of the above matters, the Secretary of State is likely to want to see evidence which goes beyond mere assertion: for example, in a case such as the present where the explanation is that the Applicant was distracted by his concern for his son's health, there should be documentary evidence about the matter. If there is, then the Secretary of State would need to weigh up whether such concern genuinely excuses or explains the failure to account for tax, or at least displaces the inference that the Applicant has been deceitful/dishonest. The Secretary of State, before making her decision, should call for the evidence which she considers ought to exist, and may draw an unfavourable inference from any failure on the part of the Applicant to produce it.

(viii) In her decision, the Secretary of State should articulate her reasoning, setting out the matters which she has taken into account in reaching her decision and stating the reasons for the decision she has reached.

35. For the reasons given, I find that the SSHD has shown that there are grounds to engage paragraph 322(5) and applying the jurisprudence in *R (Khan)*, the husband has failed to displace the inference of deceitful or dishonest behaviour. Such evidence as would likely to have been sufficient to displace the inference could have been easily and inexpensively obtained. The proffered explanations are for the reasons given inadequate. Additionally, there are the apparent discrepancies or omissions in

the husband's claims in relation to the preparation and filing of the 2011 tax return evidence.

36. Looking at the various claims made by the husband and the evidence or lack of evidence and the explanations for such lack and what was said in *R(Khan)*, I am satisfied the SSHD has shown it was reasonable to refuse the husband's application by way of reference to paragraph 322(5) of the Immigration Rules and the husband has failed to show that in all the circumstances it would be disproportionate to refuse his claim for indefinite leave based on long residence.
37. The wife cannot meet any of the time critical requirements of paragraph 276 ADE(1) of the Immigration Rules. The husband's appeal has been dismissed. I note the wife lived in India until she came to the United Kingdom in 2013 after her marriage in 2012 and that there was no evidence to show there are very significant obstacles to her re-integration on return to India where she has family. It would not be disproportionate to expect her to return to India with the husband.
38. The Appellants have two children, born in the United Kingdom in 2015 and 2018. They are sufficiently young not to have developed any private life outside the context of their parents. Their best interests are to remain with their parents and I find it reasonable to expect them to go with their parents to settle in India where they have extended family.
39. The appeal of each of the Appellants is dismissed on human rights grounds.

Anonymity

40. There was no request for an anonymity direction and having considered the appeal, I find none is warranted.

SUMMARY OF DECISION

The decision of the First-tier Tribunal contains an error of law and is set aside.

The appeal of each of the Appellants is dismissed on human rights grounds.

Anonymity direction not made.

Signed/Official Crest

Date 03. iv. 2019

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal

To the Respondent: Fee Awards

The appeals have been dismissed and so no fee awards may be made.

Signed/Official Crest

Date 03. iv. 2019

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal