



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/12607/2018

THE IMMIGRATION ACTS

Heard at Field House
On 25th April 2019

Decision & Reasons Promulgated
On 9th May 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE ROBERTS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SOPHIE [U]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr S Walker, Senior Home Office Presenting Officer

For the Respondent: Mr Z Malik, Counsel

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of a First-tier Tribunal Judge (Judge Wright) allowing Ms [U]'s appeal against the Secretary of State's refusal to grant her leave to remain in the UK. The date of the Secretary of State's decision is 25th May 2018.
2. For the sake of clarity throughout this decision I shall refer to the Secretary of State as "the Respondent" and to Ms [U], as "the Appellant" thus reflecting their respective positions before the First-tier Tribunal.

3. The Appellant is a national of Nigeria born 21st April 1983. She appealed to the First-tier Tribunal against the Respondent's decision refusing her application for leave to remain in the UK, pursuant to Article 8 ECHR (family/private life). The Respondent had refused the application with reference to paragraph 322(5) of the Immigration Rules.
4. In summary, the basis for the Respondent's refusal is as follows. The Appellant entered the UK originally in October 2006 in possession of a valid student visa. Thereafter she made various applications for leave to remain, all of which were granted. On 4th April 2013 the Appellant applied for further leave to remain as a Tier 1 general migrant. In order to meet necessary requirement of the relevant financial rule, she claimed a total income of £36,629. Further leave to remain was granted.
5. On 15th December 2016 the Appellant made an application for indefinite leave to remain on the basis of ten years' long residence. This application prompted an enquiry by the Respondent with HMRC. That enquiry disclosed that in tax year 2012/2013 the Appellant declared income to HMRC amounting only to a total of £10,492.65. Thus, there was a mismatch between the income that the Appellant had declared to HMRC with that declared to the Secretary of State when she had successfully obtained further leave to remain on a previous occasion. The Respondent considered that the Appellant had been dishonest and accordingly refused her application for indefinite leave to remain under paragraph 322(5) of the Rules.
6. The Appellant appealed that decision and her appeal came before First-tier Tribunal Judge Wright. In a decision promulgated on 24th January 2019 the FtTJ allowed the Appellant's appeal under Article 8. The FtTJ identified that the appeal turned on whether the Appellant was dishonest in her dealings with the SSHD and/or HMRC. If found not to be dishonest, then the discretionary refusal under paragraph 322(5) would not be justified. Thus the decision to refuse her leave would be a disproportionate one under Article 8.
7. The judge in his decision made several findings, concluding that the Appellant had not acted dishonestly at the time she submitted her tax return for 2012/2013 to HMRC, but rather that she was suffering from anxiety and panic attacks due to pressures of work and worry about family members. This had led her to submit incorrect information to HMRC. The unpaid tax was now being paid. HMRC had not taken steps to prosecute the Appellant for fraud, nor had it imposed any financial penalty. The FtTJ allowed the appeal.
8. The Respondent appealed that decision on two grounds:
 - The judge had made a mistake as to omit material facts
 - The judge had failed to take into account and/or resolve conflicts of fact or opinion on material matters.

Permission having been granted, the matter comes before me to decide whether the decision of the FtTJ contains such error of law that it requires me to set aside the decision in order for it to be re-made.

Error of Law Hearing

9. Before me Mr Walker appeared for the Respondent and Mr Malik for the Appellant. Mr Walker's submissions relied on the grounds but said that he accepted that the Respondent's challenge was essentially a reasons one. Further he acknowledged that HMRC had not sought to penalise the Appellant for the underpayment of tax.
10. Mr Malik submitted that the judge's findings were ones open to him on the evidence. The grounds amounted to no more than a disagreement with the judge's findings. In order to succeed in this appeal, the Respondent would have to show that the judge's findings are perverse/irrational. They were neither. The judge heard evidence from the Appellant, the Appellant was cross-examined and the judge found her evidence credible. He gave adequate reasons for accepting that at the time the 2012/2013 tax return was filed with HMRC, the Appellant was suffering from anxiety and panic attacks. Medical evidence that had been submitted supported her version of events. The judge was therefore fully entitled to make the findings he did and to conclude that the Appellant was not acting dishonestly.

Conclusions on Error of Law

11. I find I am in agreement with Mr Malik's submissions. The judge has set out in some detail the evidence before him including the evidence contained in the Respondent's reasons for refusal letter [26 - 30]. Furthermore he has referenced and followed the useful guidance set out in **R (on the application of Khan) v SSHD (Dishonesty, tax return, paragraph 322(5)) [2018] UKUT 00384 (IAC)**.
12. The judge noted that the Respondent was also under a misapprehension that the Appellant was blaming her accountant for the mistakes on her tax return. In fact, the Appellant had never sought to blame her accountant [27]. Looking at the evidence before him, the judge found that he accepted the Appellant's account that her underpayment of tax was a mistake explained by her suffering anxiety and panic attacks on account of business/family pressures. That being so, the judge was entitled to conclude that the Appellant had given an explanation showing that her miscalculation of tax was not dishonest. The Secretary of State could not prove dishonesty. Therefore, paragraph 322(5) does not apply. I find that the findings made by the judge were ones which were fully open to him to make. There is no perversity.
13. It follows therefore for the above reasons, that the appeal of the Secretary of State fails. The decision of the First-tier Tribunal discloses no error of law and it stands.

Notice of Decision

The decision of the First -tier Tribunal promulgated on 24 January 2019 discloses no error of law and shall stand.

No anonymity direction is made.

Signed C E Roberts Date 04 May 2019

Deputy Upper Tribunal Judge Roberts

TO THE RESPONDENT
FEE AWARD

The First-tier Tribunal made no fee award. That decision stands.

Signed C E Roberts Date 04 May 2019

Deputy Upper Tribunal Judge Roberts