Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/01884/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 February 2020	**On 26 February 2020**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

MR SHAHZAD AHMED MIR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Z Malik, Counsel, instructed by Marks & Marks Solicitors
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

This is the Appellant's appeal against the decision of First-tier Tribunal Judge Nash ("the judge"), promulgated on 31 July 2019, by which she dismissed the Appellant's appeal against the Respondent's decision of 14 January 2019, refusing his human rights claim made on 20 September 2016.

The Appellant, a national of Pakistan born on 19 November 1982, had arrived in the United Kingdom on 15 September 2006 and has remained in the United Kingdom with leave. Prior to the expiry of his final period of leave an in time extension application was made and this application was subsequently varied on the basis of his long residence in this country. That varied application was treated as a human rights claim by the Respondent.

In refusing that application, the Respondent relied upon earnings discrepancies as between figures put forward to the Respondent in two applications made in March 2012 and March 2013 respectively, and those put forward to HMRC in the tax years 2010/2011 and 2012/2013. The Respondent concluded that the discrepancies were as a result of dishonesty on the Appellant's part rather than merely carelessness. In light of this conclusion the Respondent applied paragraph 322(5) of the Immigration Rules and in turn concluded that the Appellant could not succeed under paragraph 276B or 276ADE of the Rules. Article 8 was considered on a wider basis, but it was concluded that the Appellant could not benefit from this.

The judge's decision and the grounds of appeal

In summary, the judge concluded that the Appellant had been dishonest in respect of the earnings discrepancies. In turn, she concluded that the Appellant could not succeed under Article 8 with reference to any of the Rules or otherwise.

Four grounds of appeal are put forward: first, that the judge had misapplied the burden and standard of proof; second, that the judge failed to consider the exercise of discretion for herself pursuant to paragraph 322(5) of the Rules; third, that the judge had erred in her consideration of an expert medical report; fourth, that the judge had failed to address the issue of the Appellant's risk of suicide in light of the medical evidence.

Permission to appeal was granted by Upper Tribunal Judge Sheridan on 7 December 2019.

The hearing

At the hearing before me, Mr Malik relied on the four grounds. In respect of ground 1 and with reference to [26] of the judge's decision, he submitted that there was a clear error, the judge having stated that the burden of proof rested with the Appellant. The last sentences of [33], [34] and [39] all referred to an absence of evidence from the Appellant. This supported the assertion that the judge had failed to apply the appropriate three-stage approach to cases such as the present: that the evidential burden rested with the Respondent; that if this was discharged, it was for the Appellant to provide an explanation capable of belief; and that if this was done, the legal burden rested with the Respondent to show dishonesty.

Mr Malik submitted that in respect of ground 2 the judge was bound to have considered the discretion on the issue under paragraph 322(5) of the Rules because this was part and parcel of the assessment of whether the Appellant could satisfy the Rules as a whole, which in turn went to the question of whether he was able to succeed on Article 8 grounds. Ground 3 was predicated on the basis that the judge had been wrong to reject the report of Dr Karim (a Consultant Psychiatrist) simply on the basis that it was based upon an account provided by the Appellant. Finally, in respect of ground 4, the judge had simply failed to engage with the issue of the risk of suicide despite the well-known case of J [2005] EWCA Civ 629, it having been relied on.

Ms Isherwood submitted that there were no material errors in the judge's decision when it was viewed holistically. She submitted that [26] was a standard paragraph and as a matter of substance the judge had approached the issue of burden of proof correctly. In respect of the medical evidence, the judge had viewed this holistically, together with evidence from the Appellant's GP. [42] of the judge's decision contained other reasons for rejecting that part of Dr Karim's report, not simply the fact that it was based on the Appellant's own history.

In reply, Mr Malik urged me to be cautious in "reading in" reasons to the judge's decision that were not there, particularly in relation to the burden of proof issue.

At the end of the hearing I reserved my decision on the error of law issue.

Decision on error of law

I conclude that the judge has not materially erred in law. I say this having read the judge's decision holistically and acknowledging that there are aspects of it which may have been expressed more clearly. However, it is not my task to seek perfection in a decision of the First-tier Tribunal, but to assess it sensibly and with an eye on substance over form. I will deal with the four grounds of appeal in turn.

Ground 1

At [26] the judge does clearly state that, "the burden is on the Appellant and is on the balance of probabilities." In the context to this case, that was clearly wrong. I turn to the substance of the judge's analysis and reasoning to assess whether or not this misdirection was in reality on account of a standard paragraph which had not been excised from the decision rather than a material error in approach.

At [30] the judge refers to the decision of the Court of Appeal in Balajigari [2019] EWCA Civ 673. In the same paragraph, and with apparent reference to that judgment, the judge states: "… there is no legal burden on the Appellant to disprove dishonesty." This statement is clearly correct. It is of some significance that it is contained in a paragraph making reference to a relevant

authority (albeit one concerning a judicial review context rather than a statutory appeal).

In the next paragraph the judge goes on to state as follows: "I accordingly go on to consider on the balance of probabilities whether the Appellant was dishonest in relation to his tax affairs bearing in mind the very serious consequences of such a finding, taken into account all the evidence before me." There is nothing legally objectionable in that.

At [44], having stated that a number of factors had been taken into account together with an assessment of the evidence as a whole, the judge concludes that: "I find on the balance of probabilities that the Appellant was able to and did check his tax returns before they were filed and accordingly he was dishonest either in his representations to the tax authorities or the immigration authorities or both."

Taken together, the cumulative effect of these three references satisfies me that the judge did in fact have in mind the correct location of the legal burden of proof in this particular case, namely that it rested with the Respondent. Thus, the erroneous reference in [26] was, with respect, careless on the judge's part but did not represent her substantive consideration of the core issue in the case together with the evidence pertaining thereto. It is right that the judge did not state in terms that the second stage of the three-stage approach is to determine whether the individual had put forward an explanation capable of belief. However, reading the judge's decision holistically, I conclude that either she has found that no such explanation was in fact offered up by the Appellant or (and perhaps the better view) is that such an explanation was present but that ultimately the Respondent has discharged the legal burden in light of the applicable standard of proof. For these reasons I reject ground 1.

Ground 2

I am not entirely convinced by Mr Malik's suggestion that a judge is bound to consider the exercise of discretion under paragraph 322(5) in an appeal in which dishonesty has been found. The substitution of discretion is not a matter that the First-tier Tribunal has a jurisdiction to consider anymore. However, he may be correct in the sense that the question forms part and parcel of the question of whether an individual can satisfy the Rules (in this case, there was no dispute that all other aspects of paragraph 276B were met) because an ability to satisfy the Rules would be highly relevant (if not determinative) of an Article 8 claim on appeal (see for example TZ (Pakistan) [2018] EWCA Civ 1109). In any event, whilst the judge did not specifically address this issue in her decision, there is nothing of material relevance to the issue of discretion under paragraph 322(5) that she did not otherwise consider in respect of the wider Article 8 assessment (see [54] – [65] of the decision).

Further, the judge found, as she was entitled to, that in addition to the two earnings discrepancies specifically relied on, the evidence indicated that the Appellant had put forward a further earnings discrepancy for the tax year 2011/2012, a fact that was described by the judge as representing "a pattern"

to the other discrepancies (see [36]). Therefore, the failure by the judge to specifically address the issue of discretion was not material and I reject ground 2.

Ground 3

In a sense this linked to the first ground, as it goes to the issue of the Appellant's explanation for the earnings discrepancies. Mr Malik's submission on the judge's treatment of the report of Dr Karim was, to a limited extent, right in principle. The fact that a suitably qualified expert takes a history from an individual (in other words, that there is self-reporting) is not usually in and of itself sufficient to justify a rejection of the expert's opinion. Having said that, it is of course for the fact-finding tribunal to reach an overall assessment of the reliability of an individual's account.

With reference to [40], the judge was entitled to take into account the fact that the Appellant had not reported mental health problems to his GP in the United Kingdom until 2017, notwithstanding some evidence that there had been prescriptions relevant to mental health problems made in Pakistan in 2010, 2012 and 2013. The judge was entitled to take account of the absence of a letter from a Pakistani doctor which had apparently been seen by Dr Karim when preparing his report.

With respect to [42], the judge was not rejecting Dr Karim's evidence out of hand *solely* on the basis that it was predicated upon an account provided by the Appellant. She had already taken account of other matters (see above) and was also entitled to take account of what was said in the GP records and the fact that at the material time the Appellant had been working and earning a good income. In addition, the judge was entitled to rely on the fact that Dr Karim had not been the treating clinician for the Appellant at the material time (these being the years relating to the relevant tax returns). There is no error in respect of ground 3.

Ground 4

It is very unclear as to whether the Article 3/suicide issue was in fact argued before the judge. [13] does not indicate any specific reliance having been placed on it. However, [22(iv)] and (vi) do make reference both to a risk of suicide and the case of J. J is referred to once again in [60], although the judge states in terms that there was no Article 3 claim before her. I am not satisfied that the Article 3/suicide claim was properly put to the judge as a discrete issue.

However, even if I was wrong about that, the judge clearly had the issue in mind and had been referred to the leading case on the issue. At [59] she found that there was insufficient evidence that the Appellant would be unable to access relevant medical treatment in Pakistan. She rejected Dr Karim's assertion that there would be no such treatment available on the sustainable basis that he had not practised as a psychiatrist in Pakistan since 2000 and his opinion on the facilities in that country could not carry relevant weight. In light

of the unchallenged conclusion on the potential availability of relevant treatment in Pakistan and the high threshold in suicide cases (as recently re-emphasised in AXB (Article 3 health: obligations; suicide) Jamaica [2019] UKUT 00397 (IAC)) the judge's failure to have addressed this issue in greater detail was immaterial. The Appellant could not have succeeded on this basis. There is no material error in respect of ground 4.

In light of the foregoing, the judge's decision contains no material errors of law, the Appellant's appeal to the Upper Tribunal must be dismissed and the decision of the First-tier Tribunal shall stand.

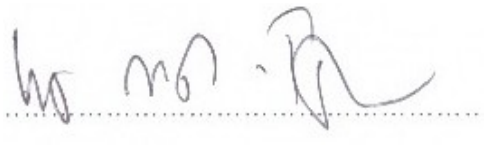
Notice of Decision

The decision of the First-tier Tribunal does not contain material errors of law.

The Appellant's appeal to the Upper Tribunal is dismissed.

The decision of the First-tier Tribunal stands.

No anonymity direction is made.



Signed ..... Date: 11 February 2020

Upper Tribunal Judge Norton-Taylor