



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal number: HU/04034/2019 (V)

HU/02980/2019 (V)

THE IMMIGRATION ACTS

Heard Remotely

On 13 January 2021

Decision & Reasons Promulgated

On 27 January 2021

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BALWINDER KAUR THIND

HARJASKARAN SINGH THIND

(ANONYMITY ORDER NOT MADE)

Respondents

DECISION AND REASONS (V)

For the Appellant: Mr A McVeety, Senior Presenting Officer

For the respondents: Mr cc, instructed by Law and Lawyers Solicitors

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. At the conclusion of the hearing, I reserved my decisions and reasons, which I now give. The order made is described at the end of these reasons.

1. For the purpose of this decision and in order to avoid confusion, I have referred below to the parties as they were at the First-tier Tribunal appeal hearing.
2. The appellants are wife and husband, Indian nationals with dates of birth given as 2.6.78 and 14.8.77, respectively.
3. The respondent Secretary of State has appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal promulgated 13.1.20 (Judge Traynor), allowing the appellants' appeals against the decisions of the Secretary of State, dated 30.1.99 and 18.2.19, to refuse their respective applications for leave to remain in the UK on private and family life human rights grounds.
4. The first appellant applied on 24.4.18 for indefinite leave to remain on the basis of 10 years' continuous lawful residence, pursuant to paragraph 276B of the Immigration Rules. This was refused as the 10-year period relied on had been broken by an invalid application in April 2009, so that by the time the application was resubmitted in August 2009 her leave had expired. The application was further refused under paragraphs 276B(ii) and 322(5) on the basis of irreconcilable discrepancy between declaration of income for the purpose of obtaining further leave and her declaration of income to HMRC.
5. The respondent's decision of 18.2.19 refused the second appellant's human rights application made on 3.6.16 for leave to remain under Appendix FM family life with the first appellant. The respondent considered that there were no insurmountable obstacles to family life continuing in India and no exceptional circumstances which would have rendered the refusal a breach of article 8 ECHR because of unjustifiably harsh consequences.
6. At [43] of the decision, Judge Traynor agreed with the respondent that there had been a break in the continuity of residence, rejecting the first appellant's argument that the refusal was unfair. However, he found that she had provided a plausible and credible explanation for the discrepancy in income declarations sufficient to defeat the burden of proof on the respondent to establish dishonesty for the purpose of paragraphs 322(5) and 276B(ii). The judge also concluded at [45] of the decision that by the date of the appeal hearing in September 2019, and measuring from her valid application in August 2009, the first appellant now met the 10 years' continuous lawful residence requirement, a fact accepted at the hearing by the Presenting Officer (see [33] of the decision). In consequence of these findings, the judge concluded that refusal of the long residence application was disproportionate and breached the appellants' rights under article 8 ECHR.

The second appellant's appeal was entirely dependent on that of the first appellant. In the premises, the appeals of both appellants were allowed on human rights grounds.

7. The grounds of application for permission to appeal submit that the First-tier Tribunal failed to make a finding on the refusal under paragraph 322(5). It is argued that the respondent did not fail to discharge the burden of proof and that the first appellant only sought to regularise her tax affairs because she had been alerted to a pending Home Office enquiry as to the discrepancy. Inaccurate records were submitted with the consent of the first appellant. The judge had found the appellant untruthful when claiming she was unaware of the rejected invalid application and failed to provide any plausible explanation as to why it was not resubmitted earlier.
8. The respondent also argues that the First-tier Tribunal provided no reasoning for the finding that the first appellant's circumstances were complex and not credible that she would sign-off annual accounts with such a significant discrepancy. "*The Tribunal has failed to make a finding on whether the appellant signed off on the figures and it is submitted that the Tribunal's acceptance is simply not rational.*" It is further argued that the Tribunal's assessment failed to give adequate consideration to the appellant's responsibilities as identified at headnotes 4 and 5 of Khan, R (on the application of) v Secretary of State (dishonesty, tax return, paragraph 322(5)) [2018] UKUT 384 (IAC), which held that it is not sufficient for an appellant to blame the accountant given that the accountant would or should have asked the taxpayer to confirm the accuracy of the tax return. "*If the applicant does not take steps within a reasonable time to remedy the situation, the Secretary of State may be entitled to conclude that this failure justifies a conclusion that there has been deceit or dishonesty.*" Khan also sets out a number of matters to be considered when deciding whether the applicant was dishonest or merely careless.
9. Permission to appeal to the Upper Tribunal was granted by the First-tier Tribunal on 31.3.20, on the basis that it is arguable that in respect of the first ground, the judge "*skates over certain aspects of the evidence which are less than favourable to the appellant*". In relation to the second ground, the judge granting permission considered it arguable that the judge "*has not explained why it has simply been accepted, particularly in the light of the finding of dishonesty, why blind faith in one's accountant is seemingly acceptable and permissible to discharge a burden.*"
10. I have carefully considered the decision of the First-tier Tribunal in the light of the submissions and the grounds of application for permission to appeal to the Upper Tribunal. In compliance with directions issued on 14.7.20, the Upper Tribunal has also received the respondent's written submissions dated 29.7.20 and the appellants' reply, dated 30.7.20. I have taken both sets of submissions into account.
11. In large part the grounds amount to a disagreement with the findings and conclusion of the First-tier Tribunal and are poorly drafted, as Mr McVeety fairly

conceded when I put my concerns to him. For example, it is argued in the grounds that the first appellant only sought to regularise her affairs because she had been alerted that the Home Office would be making enquiries as the discrepancy in income declarations stating, *"I submit that this proves that she only did so because she had to."* This was an argument advanced and clearly identified at the First-tier Tribunal appeal hearing, which the judge carefully considered at [41] of the decision. However, at [42] the judge found that the respondent had not provided evidence to demonstrate that the belated regularisation of her tax affairs was done in contemplation of the respondent's pending enquiries as to the discrepancy. The judge accepted the argument of the appellant's representative that the respondent's argument was based on mere suspicion and not made out on the evidence.

12. In oral submissions Mr McVeety pointed to the appellant's inconsistent explanations as recorded by the judge at [38] of the decision and asserted that at [42] of the decision the judge was in error in stating that the appellant *"has always explained"* the source of the discrepancy as being in consequence of expenses being accounted for over two accounting periods. Whilst I agree it is not accurate that the appellant *"has always explained"* the discrepancy in this way, having previously cited the distraction of health and financial problems, it is clear that the judge gave careful consideration to all the arguments advanced and reached findings open on the evidence.
13. The fact that the first appellant had been found not truthful in relation to events surrounding the payment of fees for her Tier 1 application was, obviously, relevant and taken into consideration by the First-tier Tribunal. However, it does not necessarily follow that because she was dishonest about one aspect, she was also to be disbelieved about the rectification of her tax affairs.
14. The judge was aware and took into account the guidance in Khan, the headnote of which was set out in full at [39] of the decision. The judge there confirmed that the competing arguments had been considered in the light of the guidance in Khan. At [41] the judge summarised the position that the determination of the appeals *"boil down to whether or not I find there is evidence which is both cogent and compelling to support the respondent's suspicion that the first appellant has acted either deceitfully or dishonestly."*
15. Applying Khan, the judge considered the competing arguments, ultimately accepting at [43] of the decision that the appellant had provided a plausible and credible reason for the discrepancy. The judge considered that there was no reason why the first appellant would under-declare her income when no other year disclosed such a discrepancy, stating *"I find that this, of itself, is compelling evidence which supports the plausible explanation given that any discrepancy in regard to the subsequent tax return arose as a consequence of expense payments covering two financial accounting periods, "* the explanation being that proffered by the first appellant's accountants, as set out at [42] of the decision.

16. The second ground, alleging a failure to provide adequate reasoning is a recasting of the first ground and adds little. The arguments in this ground are nothing more than that, arguments which fail to identify any error of law rather than a mere disagreement with the decision.
17. Contrary to the written submissions which largely mirror the grounds, the decision of the First-tier Tribunal does not fail to make a decision on the “*relevance of paragraph 322(5)*”. It is this paragraph which exercised the judge’s careful consideration in the more part of the impugned decision.
18. I agree with the appellants’ reply to the respondent’s written submissions, that they amount to a series of submissions, all of which were put before the First-tier Tribunal appeal hearing, and that they fail to ‘pinpoint’ a material error of law. On a reading of the decision as a whole, I am satisfied that the decision discloses no such error as claimed by the respondent. Whilst a different judge may have reached a different conclusion on the evidence and as to the first appellant’s credibility, it cannot be said that the findings made were not open to the judge on the evidence and for which cogent reasoning has been provided. The decision was neither perverse nor irrational. All of the arguments now advanced by the respondent were carefully considered and determined.
19. In the circumstances and for the reasons set out above, I find no material error of law in the decision of the First-tier Tribunal.

Decision

The appeal of the respondent to the First-tier Tribunal is dismissed.

The decision of the First-tier Tribunal stands, and the appeal of each appellant remains allowed on human rights grounds.

I make no order for costs.

I make no anonymity direction.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 13 January 2021