



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/05312/2019

THE IMMIGRATION ACTS

**Heard at Field House
On 7 November 2019**

**Decision & Reasons Promulgated
On 15 November 2019**

**Before
UPPER TRIBUNAL JUDGE FINCH**

**Between
ADIL [M]**

Appellant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. J. Gajjar, Direct Access Counsel

For the Respondent: Mr. S. Walker, Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Appellant is a national of India. He first entered the United Kingdom on 25 September 2007, as a student. His leave was subsequently granted leave as a Tier 1 (Highly Skilled) Post-study worker and a Tier 1 (Highly Skilled) General Migrant until 15 April 2016. On 13 April 2016 the Appellant applied for indefinite leave to remain as a Tier 1 (General) Migrant.

He varied this application to one for indefinite leave to remain on the basis of long residence on 14 November 2017.

2. The Appellant's application was refused on 5 March 2019 and, as his last application was deemed to be a human rights claim on private life grounds, he was able to appeal against this decision on 19 March 2019.
3. Upper Tribunal Judge Martin, sitting as a First-tier Tribunal Judge, dismissed the Appellant's appeal in a decision promulgated on 17 July 2019. The Appellant appealed against this decision and Resident Judge Phillips granted him permission to appeal on 20 September 2019.

PRELIMINARY POINT

4. At the start of the hearing, counsel for the Appellant explained that the Appellant's wife had made a separate appeal as his dependent and that her appeal had been dismissed. She had applied for permission to appeal to the Upper Tribunal, but no decision had yet been reached on her application. He asked for the two appeals to be consolidated. I explained that the only matter before me to do was the error of law hearing in relation to the Appellant, but that if I did find that there had been an error of law, I would take steps to see if the two appeals could be consolidated.
5. I made enquiries about the Appellant's wife's case (ZA (HU/08221/2019)). It was dismissed by First-tier Tribunal Judge Malik in a decision promulgated on 22 October 2019. Her subsequent application to the First-tier Tribunal for permission to appeal to the Upper Tribunal was only logged in on 8 November 2019 and has yet to be allocated to a First-tier Tribunal Judge for a decision. Therefore, there is no application before the Upper Tribunal and it is not procedurally possible for me to join it with the Appellant's appeal. It would be appropriate to forward this decision to the First-tier Tribunal with a request that it is put before the First-tier Tribunal Judge considering the Appellant's wife's application for permission to appeal to the Upper Tribunal.

ERROR OF LAW HEARING

6. Counsel for the Appellant and the Home Office Presenting Officer both made oral submissions and I have taken these into account when reaching my findings below. In

particular, the Home Office Presenting Officer did not rely on the Rule 24 Response and conceded that the grounds relating to how the Judge approached the evidence had some force and suggested that she had made errors of law in her decision.

ERROR OF LAW DECISION

7. The Appellant had made a human rights claim but a consideration of whether he could qualify for leave to remain under the Immigration Rules was a pre-condition to the necessary proportionality exercise under Article 8(2) of the European Convention on Human Rights. The Appellant could not qualify for indefinite leave to remain if one of the general rules for refusal applied to him. In particular, paragraph 322 of the Immigration Rules states:

“In addition to the grounds for refusal of extension of stay set out in Parts 2-8 of these Rules, the following provisions apply in relation to the refusal of an application for leave to remain, variation of leave to enter or remain...

(5) the undesirability of permitting the person concerned to remain in the United Kingdom in the light of his conduct (including convictions which do not fall within paragraph 322(1C), character or associations or the fact that he represents a threat to national security”.

8. In her refusal letter, the Respondent found that paragraph 322(1C) applied as the information provided to her when the Appellant applied for leave to remain as a Tier 1 Highly Skilled (General) Migrant on 26 February 2011 differed from the information provided to HMRC when he made his tax returns for the years ending 5 April 2010 and 5 April 2011.
9. The witness statement by the officer from HMRC, dated 28 February 2019, confirmed that the Appellant’s tax return for the year ending 5 April 2010, which was submitted on 28 January 2011, showed that he had declared a PAYE income of £9,415 and a self-employed income of £901. It also confirmed that his tax return for the year ending 5 April 2011, which was submitted on 30 April 2012, showed a PAYE income of £282 and a self-employed income of £8187.
10. In relation to the first ground of appeal, in paragraph 48 of her decision, Upper Tribunal Judge Martin, sitting as a First-tier Tribunal Judge, found that:

“The responsibility for the filing of tax returns, whether an accountant is employed or not, rests with the person concerned. I do not accept that it [is] credible that the appellant would not have been surprised at his having to pay no tax given the amount of his actual earnings”.

11. However, there was evidence before the Judge which showed that the Appellant had paid £308.80 in tax for the year ending 5 April 2011.
12. Therefore, the Judge made a clear factual error in paragraph 48 of her decision.
13. In relation to third ground of appeal, in paragraph 45 of her decision, the Judge found that “it is simply not credible that a person who has been engaged working in the financial sector and has been in the UK for 10 years would be as ignorant of the UK tax systems as he claims”. However, Upper Tribunal Judge Martin failed to take into account the fact that the Appellant first entered the United Kingdom on 25 September 2007 and did not start working for Santander Bank until November 2014. In addition, the evidence, in the form of his tax return for 2010/2011, indicates that at that time he was working as self-employed sales and management consultant.
14. Therefore, the starting point for the Judge’s findings in relation to the Appellant’s credibility in paragraph 43 of her decision were undermined by her assumption that he had worked in the banking and financial sector at the time he had instructed his book-keeper/accountant to make his first two tax returns.
15. In addition, in relation to ground four, when the Judge was considering the circumstances surrounding the Appellant’s first two tax returns, she failed to consider the explanation given by the Appellant’s current accountants, Medina Accountants, about how the earlier errors in his tax returns had occurred. In their letter, they explained that they had reviewed his tax return for 2010-2011 and had identified that errors had been made by his previous book-keeper/accountant. They had also drawn up a table in which they identified the expenses which his previous book-keeper/accountant had wrongly believed to be allowable against tax, in the form of rent, food, BB and utilities. They also noted that the costs of a mobile, personal use of fuel and car repairs, washing and insurance had also been claimed as expenses but were not fully allowable. The table also showed that if the non-allowable expenses were deducted

the Appellant's net profit was £8187, which is the net profit given in his tax return for 2010/2011.

16. Upper Tribunal Judge Martin also failed to take into account the fact that the Appellant had submitted a copy of his unaudited accounts, dated 10 February 2011, which confirmed an operating profit of £37,440 and provided a sales summary for the previous year for the gross amount of £39,792.66. This was the figure for sales referred to by Medina Accountants in their table indicating the errors made by the Appellant's previous book-keeper/accountant.
17. These unaudited accounts were relied upon by the Respondent, as can be seen from the caseworker's notes contained in the Respondent's Bundle. In addition, I accept that HMRC would have relied on his bookkeeper/accountant to calculate his allowable expenses accurately.
18. The evidence before the Judge arguably amounted to an innocent explanation for him not realising that his early tax returns had not been accurate.
19. For these reasons, there were material errors of law in the Judge's decision.
20. Therefore, it was not necessary to explore the Appellant's first ground of appeal which was much weaker and depended upon an unreported decision of the Upper Tribunal. Counsel for the Appellant also accepted that this ground would not be determinative in relation to the question of the Appellant's credibility

DECISION

- (1) The Appellant's appeal is granted.
- (2) Upper Tribunal Judge Martin's decision is set aside.

REMAKING

1. I adopt my findings above which indicate that the Appellant would not have been aware that his bookkeeper/accountant, Financial Service Partners, at the relevant time had miscalculated the expenses which he could claim against his tax liability as

a self-employed person. He had only just entered into self-employment and was not at that time even working in a bank.

2. The evidence provided by his present accountants, Medina Accountants, gave a detailed explanation of the mistakes made by his previous accountants.
3. In paragraph 51 of her decision, Upper Tribunal Judge Martin, sitting as a First-tier Tribunal Judge, also noted that:

“Apart from the appellant’s assertions I have no evidence either from his former accountants or ACCA to indicate that the error was that of the accountant. I acknowledge the firm concerned no longer exists, but its proprietor remains commercially active and could have been contacted. The appellant chose not to seek him out and I have only his assertion that he made any enquiries at all”.

4. The Appellant has now been able to trace this proprietor and the Appellant has made a Rule 15(2A) application to provide the Upper Tribunal with evidence which was not before the First-tier Tribunal when it reached its decision.
5. I have considered this evidence and find that by its nature it is very relevant to the issue in question and could not have been produced before the First-tier Tribunal. Therefore, I find that it is in the interests of justice to admit it into evidence for the purpose of this re-hearing.
6. The email trail contained in the bundle indicates the difficulties the Appellant faced when tracing a person who is now practicing in a different jurisdiction. The evidence shows that the Appellant tried to contact the man who completed his tax returns by Facebook and email without any success but that he then obtained his new professional email through a friend.

7. Eventually in an email, dated 18 October 2019, Pratik Modi looked through the Appellant's accounts and statements and accepted that he had made errors when filling in the Appellant's returns.
8. In addition, there were emails which confirmed that the Appellant has now made a formal complaint about Pratik Modi to the ACCA and that this complaint had been acknowledged.
9. Taking the totality of the evidence into account, I find that paragraph 322(5) of the Immigration Rules does not apply, as the evidence does not indicate that the Appellant's conduct and character in relation to his tax returns for the years ending on 5 April 2010 and 2011 and his application to the Respondent, dated 26 February 2011 showed that it was undesirable to permit him to remain in the United Kingdom.
10. In her refusal letter, dated 5 March 2019, the only other reasons given for refusing to grant the Appellant indefinite leave to remain was that he did not meet the requirements of paragraphs 27B(ii) and (iii) of the Immigration Rules.
11. For the reasons given above, I also do not find that these paragraphs apply to the Appellant, as there are no reasons why it would be undesirable for him to be given indefinite leave to remain on the ground of long residence and he does not fall for refusal under the general grounds for refusal.
12. The Respondent did not dispute that the Appellant had been living, studying and then working in the United Kingdom since 25 September 2007. Therefore, he had clearly established a private life here for the purposes of Article 8(1) of the European Convention on Human Rights.
13. When considering whether breaching his right to continue to enjoy a private life here is proportionate for the purposes of Article 8(2) of the European Convention on Human Rights, the fact that he is entitled to indefinite leave to remain under the

Immigration Rules is a factor which clearly indicates that it was be a disproportionate breach of Article 8 to refuse to grant him leave to remain.

14. For all of these reasons, I allow the Appellant's appeal.

Decision

(1) The Appellant's appeal is allowed.

Nadine Finch

Signed
Upper Tribunal Judge Finch

Date 12 November 2019