



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

Appeal Numbers: IA/14873/2014
IA/14875/2014
IA/14876/2014
IA/14877/2014
IA/14878/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 2nd March 2015**

**Decision & Reasons Promulgated
On 13th April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

**(1) MUHAMMAD AMJAD SIDDIQI
(2) NADIA AMJAD SIDDIQI
(3) MUHAMMAD ASHAR SIDDIQI
(4) RAMEEN AMJAD
(5) MUHAMMAD AZLAN SIDDIQI
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Miss J Lowis (Counsel)
For the Respondent: Mr S Whitwell (HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge JDL Edwards, promulgated on 25th November 2014, following a hearing at Richmond on 14th November 2014. In the determination, the judge dismissed the appeals of Muhammad Amjad Siddiqi, Nadia Amjad Siddiqi, Muhammad Ashar Siddiqi, Rameen Amjad, and Muhammad Azlan Siddiqi. The Appellants applied for, and were granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellants

2. The Appellants are all citizens of Pakistan. They comprise a family. The first and second Appellants are husband and wife respectively. The remaining Appellants are their children aged 9, 8, and 4 years respectively. They appealed against the decision of the Respondent dated 12th March 2014, to refuse their application for leave to remain in the UK. The application was that of the principal Appellant, Mr Muhammad Amjad Siddiqi, to remain in the UK as a Tier 1 (General) Migrant, under Rule 245CD of the Immigration Rules, and under Rule 391(e) and 391(j).

The Judge's Findings

3. The judge had regard to the fact that the Respondent Secretary of State had refused the application of Mr Siddiqi on the basis that he could not meet the requirements of paragraph 245CD(a) and (b) in respect of his earnings and funds available to him. Furthermore, he had made a false declaration of the level of his earnings in respect of his application set out at paragraph 3(b) (paragraph 4). The judge went on to set out the Immigration Rules with specific reference to Rule 245CD(a) and (b) and noted that the Appellant was alleged not to have been able to claim the requisite 75 points (see paragraph 9). The law in relation to human rights was also set out (see paragraphs 14 to 16). The judge gave consideration to the Appellants setting up of companies through the British Education Office and the World Plus Ltd (see paragraph 18), and noted that there had been a late submission of his tax return, for which the Appellant blamed their accountant. The judge was not impressed by these excuses (see paragraph 19).
4. The judge dismissed the appeal on the basis of two essential matters. First, he did not accept the criticism of the Respondent and the HMRC for only asking about employment, income and not that of self-employment, because he took the view that the following proves the latter, and that in any event, "the annual tax return has questions about both" (paragraph 26). Second, he was not impressed by the fact that the income relied upon in the current application had not been disclosed to the HMRC at the date of the application as it should have been (paragraph 27). In taking all these matters into account, the judge said that the Appellant failed to comply with the wording of Rule 322 and that there had been a false representation.
5. The appeal was dismissed.

Grounds of Application

6. The grounds of application state that the application of the Appellant and his family for indefinite leave to remain as Tier 1 (Migrants) was wrongly refused. The judge erred in that he placed the burden of proof in relation to paragraph 322 on the Appellant when it ought to have been on the Respondent Secretary of State. Further, the judge could have dismissed the appeal on the basis that paragraph 245CD(b) was not met. However, he did not make an explicit finding in this respect. What the judge did was to simply say that the Appellant, Mr Siddiqi, had not been able demonstrate the income claimed by reference to the wording of paragraph 322 (but in this respect, the burden lay on the Respondent rather than on the Appellant). Finally, the judge did not give reasons for rejecting the documentary evidence produced by Mr Siddiqi that he had indeed disclosed the foreign income in his 2010 application. These were three reasons which made the application for permission arguable.

Submissions

7. At the hearing before me on 2nd March 2015, Miss Lewis, appearing on behalf of the Appellant, made the following submissions. First, she emphasised that the Appellant had entered the UK on 24th June 2008 as a highly skilled migrant. He had leave to remain until 26th March 2010. Before the expiry of his leave in February 2010 he made an application for a Tier 1 (General) extension visa. This was the 2010 application. The principal Appellant relied on earnings from work for the previous twelve months which exceeded £40,000. The earnings were derived from income from two different sources in two different countries. In the UK the Appellant had World Plus Ltd. In Pakistan he had a British education of his (BEO). The latter provided the bulk of his income to the tune of over £35,000. The Appellant supplied original payslips and he supplied an original bank statement.
8. Second, the Appellant could qualify under paragraph 245CD of the Immigration Rules by showing that he stood to be awarded 45 points. These would be calculated by the award of 30 points for the principal Appellant's Bachelors degree together with 45 points for his previous earnings of £40,000. He then stood to benefit from indefinite leave to remain.
9. Third, the judgment focuses solely on paragraph 322 of the Rules. Judge Edwards wrongly placed the onus of proof on the principal Appellant to establish that he had made false representations. This was contrary to the case law.
10. Fourth, the judge failed to give adequate reasons for rejecting the documentary evidence in relation to the principal Appellant's income. At paragraph 25 of the judgment, the judge said that, "the foreign income should have been identified clearly in the 2010 application and was not". However, Miss Lewis argued that the principal Appellant had done precisely this. In the principal Appellant's covering letter and in the past earnings documentation this was made clear as these

documents accompanied the 2010 application and were plainly before the judge. Accordingly, there had been an error of law.

11. For this part, Mr Whitwell submitted that the judge had not erred with respect to placing the burden of proof on the Appellant. This is because the judge was plainly aware about the application of paragraph 245CD because he set it out in full at paragraph 9 of the determination at the outset. It was only subsequently that he went on to deal with paragraph 322 on the basis that matters had not been properly represented by the Appellant. At paragraph 24 the judge specifically then deals with the burden of proof. At paragraph 27 the judge states that the income relied on has not been disclosed to the HMRC.
12. After explaining that there had been less than full disclosure to the HMRC, the judge then states (at paragraph 28), that “taking the above matters together, I find that it has not been established to the required standard that Mr Mubarik has had the income he claims to have had”. The judge was entitled to come to this conclusion. The Appellant did not, on what was a points-based application, meet the Rules at the date of the application.
13. Finally this left Article 8 of the ECHR. Given that the judge did look at the documentary evidence (see paragraph 17), and given that the judge was of the view that matters had been above board from the HMRC (see paragraph 27), the judge was entitled to conclude that the balance of considerations did not fall in favour of the Appellant under Article 8.
14. In reply Miss Lowis submitted that in his “Conclusions” the judge was not looking at paragraph 245CD(a) and (b). He was looking at paragraph 322. He determined the appeal on the basis of paragraph 322 only. Yet, the burden here lay on the Respondent. It did not lay upon the Appellant.
15. Second, paragraph 19 of Appendix A makes it clear that the Appellant must provide at least two different documents, and the Appellant in this case had done exactly that, so that the Appellant did succeed under paragraph 245CD(a) and (b).
16. Third, the judge did not make clear whether findings were made in relation to paragraph 245CD(a) and (b). He relied solely on paragraph 322. Yet, the effects of a reliance on paragraph 322 are draconian. An Appellant who is subject to the application of paragraph 322 is barred from re-entering the country for the next ten years.

Error of Law

17. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows.

18. First, it is clear from Miss Lewis' admirably clear, succinct, and measured submissions before me, that the Appellant did submit with his 2010 application a covering letter and a past earnings explanation. In a well compiled Skeleton Argument, Miss Lewis explains how the Appellant's documentary evidence included an explanatory letter sent by his new accountants, AS Accountants, explaining the reasons for the Appellant's late submission of tax returns (see pages 31 to 32 of the Appellant's bundle). In that letter, it is made clear that, in respect of the Appellant's 2009 to 2010 earnings, he had been advised by his then tax advisor, Fradalit Associates, that his income from BEO did not need to be declared in the UK because, under HMRC guidance, the Appellant was considered to be resident, but not domiciled in the UK. The Appellant did not need to declare foreign income on which he had already paid tax to the relevant foreign country. When in January 2014, the Appellant appointed AS Accountants as his new accountants, they advised him that the Appellant was entitled to foreign tax credit relief in respect of tax paid in Pakistan. Even so, their view was that it was best for the Appellant to adopt a cautionary approach and to declare his income from BEO voluntarily to the HMRC. This the Appellant did do. Quite on the contrary, therefore, rather than withhold information, the Appellant would appear to have been disclosing it in circumstances where he need not necessarily have done so.
19. Second, and importantly in this respect, when the judge does refer to documentary evidence, it is clear that he refers only to the Respondent's written evidence, as is clear from paragraph 17 of the determination, which begins with the statement at "the Respondent had raised concerns that Mr Siddiqi has not shown ...". There was no reference here made to the Appellant's documentary evidence. For these reasons, the determination is clearly flawed.
20. There is however, a third reason, which is no less important. This is the manner in which the burden of proof is placed upon the Appellant. Whereas Mr Whitwell is entirely correctly in saying that the judge does at the outset of the determination referred to paragraph 245CD(a) and (b), the fact is that in the section headed "Conclusions", which numbers five distinct paragraphs, from paragraph 24 onwards, the judge is dealing only with paragraph 322. This is clear from the body of this section which refers to the Appellant having withheld information (see paragraphs 26 to 27), and ends with the statement (at paragraph 28) that, "having regard to the wording of Rule 322, such is not relevant, as a consequence the appeals must fail". There is no consideration in this section to paragraph 245CD(a) and (b).
21. As there is no consideration of this paragraph, the statement at the beginning of this section, at paragraph 24, that "I remind myself that the onus of proof in this case relates with the Appellants to the civil standard of a balance of probabilities", must be treated with a degree of concern, because if the judge was considering paragraph 322, then the onus of proof lay on the Respondent, and not on the Appellant.

22. It was for the judge to determine that the Appellant had indeed been guilty of deceit or wilful misrepresentation. This is long established jurisprudence. All the evidence seems to indicate that the Appellant acted otherwise.
23. Accordingly, the extent of the errors in this appeal are such that, I conclude that the Appellant has been denied of a fair hearing, to the extent that the matter must be remitted back to the First-tier Tribunal to be determined by a judge other than Judge Edwards under Practice Statement 7.2.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is remitted back to the First-tier Tribunal to be determined by a judge other than Judge Edwards on a de novo basis.

No anonymity order is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

8th April 2015