



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/22052/2016
HU/00189/2017

THE IMMIGRATION ACTS

Heard at Field House
On 31 October 2018

Decision & Reasons Promulgated
On 28 November 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE LATTEER

Between

MOSHOOD [S]
KULTUM [S]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms B Asanovic, counsel.

For the Respondent: Mr S Kandola, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the appellants against a decision of the First-tier Tribunal promulgated on 30 November 2017 dismissing their appeal against the respondent's decision of 8 September 2016 refusing them indefinite leave to remain in the UK.

Background

2. The appellants are citizens of Nigeria born on 28 March 1980 and 24 April 1987 respectively. The first appellant was granted entry clearance as a student on 1 August 2006 and his leave was subsequently extended until 31 October 2010. He was granted further post-study leave under Tier 1, initially until 29 October 2012 and then until 18 March 2016. On 22 February 2016 he sought indefinite leave to remain under Tier 1 but his application was refused and was subsequently treated as withdrawn when he sought indefinite leave to remain on the grounds of long residence on 16 March 2016.
3. The second appellant entered the UK on 10 May 2010 as the first appellant's partner and has been granted leave in line with his until 18 March 2016. They have four children who have been born and brought up in the UK. They were all under seven at the date of both the respondent's decision and the hearing before the First-tier Tribunal.
4. The application for leave on the grounds of long residence was refused on the basis that the first appellant had used deceit and dishonesty in misleading government departments about his earnings and, in these circumstances, he fell within the provisions of para 322(2) and para 322(5) of HC 395 as someone who had made false representations for the purpose of obtaining leave to remain and, accordingly, it was undesirable that he should be allowed to remain in the UK.
5. These findings were based on the apparent contradictions between the information submitted in support of two previous applications for further leave to remain by the first appellant and his tax returns to HM Customs and Revenue (HMRC). In his application of 1 April 2011 to the respondent the first appellant claimed that he had earnings of £55,981 including earnings with Royal Mail of £16,514.59 and profits from his business of £39,166.92, whereas he declared in his tax return to HMRC that his business had a turnover of £42,357 and a profit of £11,649 and in his application to the respondent of 18 March 2013 he said that he had earnings of £55,041.63, earnings from Royal Mail of £23,756.44 and business profits of £31,285.19, but his tax return showed a turnover of £31,355 with a profit of £4,536. The respondent was satisfied in the light of these figures that the first appellant had made false declarations in his two previous applications and that it would be against the public interest for him to be granted indefinite leave on the grounds of his character and conduct.

The Hearing before the First-tier Tribunal

6. At the hearing before the First-tier Tribunal it was argued on behalf of the appellants that the first appellant had not acted dishonestly, there were credible explanations for the figures he had submitted to HMRC and his tax returns had been corrected before he had made the current application. It was further argued that there was a combination of factors which had led to inaccurate figures being submitted: a large

amount of expenditure not taken into account when assessing his profits and in particular he had been entitled to offset against his profits the costs of his Master's degree.

7. In addition to the evidence from the first and second appellants, there was a substantial bundle of documentary evidence including reports from Kilby Fox, accountants. Having considered the evidence, the judge found at [32] that the respondent had shown that the appellants had made false representations and had failed to disclose relevant material for the purpose of obtaining leave to remain in the UK and the appeal was dismissed.

The Grounds of Appeal

8. In the grounds of appeal, it is argued in ground 1 at para 19 that the judge's decision was tainted by errors of fact amounting to errors of law. These are particularised in para 20 (1)-(12) and it is argued that the errors of fact are such that they undermine the judge's assessment of the evidence. Ground 2 argues that the judge failed to set out the appellants' case, the submissions made on their behalf or the skeleton argument and this gave an appearance of unfairness in that their case was not properly considered and, in any event, it was unfair to go behind the figures of earnings for either of the two periods in issue as this had not been asserted in the reasons for refusal letter. Ground 3 argues that the judge failed to apply the burden and standard of proof in relation to cases of deception.
9. Permission to appeal was granted by the Upper Tribunal on the basis that the judge's assessment of the general grounds of refusal arguably treated the burden as resting on the appellants and it was also arguable that the judge had relied on the absence of documentary evidence and had erred by so doing.
10. In her submissions, Ms Asanovic referred to her statement of truth dated 13 December 2017 and, in particular, to the fact that at the hearing the first appellant had been examined in detail in relation to the documents in appendix 6 of the Kilby Fox report and at [25] the judge had said that appendix 7 did not appear in the bundle before her whereas it did. She adopted her grounds and in particular the errors of fact identified in para 20 of the grounds.
11. Mr Kandola accepted that if these errors had been made, then the judge would have erred in law by failing to take relevant matters into account and by basing her findings, at least in part, on a misapprehension of the evidence before her but it was not clear from his papers precisely what had been in front of her at the hearing.

The Error of Law

12. I am satisfied that ground 1 is made out and that the judge did err in law such that the decision should be set aside. By way of example, the judge erred factually at [25] by saying that appendix 7 of the Kilby Fox report referred to did not appear in the

bundle whereas it did at A-F 131-135. Similarly, the judge said also in [25] that she had not seen invoices from suppliers in respect of the claimed expenses, when these invoices had been the subject of cross-examination and had been produced. Further, the judge said at [31] that unfortunately appendix 6 had not been produced, whereas it had at A-F 79-130. At [36] in relation to a revised tax return, the judge commented that the document had been omitted whereas it was in appendix 11 starting at A-F 153.

13. It may be that some of these errors occurred because the bundle of documents had initially not been correctly or sufficiently indexed but Ms Asanovic explained that this issue had been raised with the judge at the beginning of the hearing and an amended index had been supplied and the respondent was given additional time to cross-check the documentation.
14. In any event, for whatever reason, documents were produced in evidence capable of affecting the judge's decision, which were not taken into account, and the judge drew adverse inferences from the failure to produce relevant documents which had in fact been produced. Ground 1 is made out and requires the decision to be set aside. Without ground 1, grounds 2 and 3 would have little substance. Both parties submitted that the proper course was for the appeal to be remitted to the First-tier Tribunal for reconsideration by way of a full rehearing. Taking into account the guidance in the Senior President's Practice Statement, I agree that this is the right course.

Decision

15. The First-tier Tribunal erred in law such that the decision must be set aside. The appeal is remitted to the First-tier Tribunal for reconsideration by way of a full rehearing by a different judge.

Signed: *HJ E Latter*

Dated: 13 November 2018

Deputy Upper Tribunal Judge Latter