



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/04518/2018
HU/04520/2018

THE IMMIGRATION ACTS

Heard at Field House
On 20 December 2018

Decision & Reasons Promulgated
On 24 January 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

PROMILA DEVI
SHYAM SOOD
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:

For the Appellant: Mr S Kotas of the Specialist Appeals Team

For the Respondents: Mr G Davidson of Counsel instructed by Elegant Solicitors

DECISION AND REASONS

The Respondents

1. The Respondents, Promila Devi and Shyam Sood are wife and husband. He claims as her dependent. They are both citizens of India born respectively in 1980 and 1983. I shall refer to the lead Respondent as "the Applicant."

2. The Applicant arrived on 26 September 2006 with leave to enter as a student which was subsequently extended and then further leave a Tier 1 (Post-Study) Migrant was granted and also extended to expire on 20 August 2016. On 18 August 2016 she applied for indefinite leave to remain based on ten years' lawful residence in the United Kingdom with her husband as her dependent.
3. They have minor children, the eldest of whom was born in 2013. On 26 January 2018 the Appellant (the SSHD) refused the Applicant's application and on 7 February 2018 refused her husband's application. He was refused as her partner because she had been refused and his claim based on his private and family life was refused for the same reasons as the Applicant was refused.

The SSHD's Original Decisions

4. The Applicant was refused by way of reference to para.322(5) of the Immigration Rules on the ground that the Respondent considered it undesirable to permit her to remain in the United Kingdom in the light of her conduct.
5. The conduct in issue was, first that there was a discrepancy between the income of £14,987 which the Applicant had declared to HM Revenue & Customs (HMRC) for the year ending 5 April 2011 and the income of £55,653.13 declared to the SSHD for purposes of her application for further leave to remain made on 4 April 2011. The Applicant had corrected her 2011 tax return resulting in a revised calculation on 23 May 2016. The additional tax due had been paid.

The SSHD also considered second that there was a discrepancy between her income of £16,957 declared to HMRC for the year ending 5 April 2013 and the income of £55,843.19 declared to the SSHD in her application for further leave of 24 June 2013.

For the same reasons, the Applicant was unable to meet the requirements of para.276B(iii) of the Immigration Rules.

6. The SSHD considered the Applicant's private and family life and concluded that on return to India she would not face undue hardship in re-integrating and there were no compassionate factors to warrant the grant of leave outside the Immigration Rules.
7. On 9 February 2018 the Applicant and her husband lodged notices of appeal under s.82 Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act). The grounds are that the Applicant has not been deceitful or dishonest in her dealings with HMRC and has paid tax on all her taxable income and there is no public interest requiring her removal. The grounds also allege the SSHD had not taken properly into account the interests of the child of the marriage and additionally the Applicant and her husband came from families with different religious beliefs, a matter not mentioned in the statements of the Applicant and her husband.

Proceedings in the First-tier Tribunal

8. By a decision promulgated on 24 September 2018 Judge of the First-tier Tribunal Ford found in favour of the Applicant that para.322(5) of the Immigration Rules was not applicable and allowed the appeal on human rights grounds.
9. The SSHD sought permission to appeal on the basis it was arguable the Judge had erred in law in her consideration of para.322(5) and had failed to give adequate reasons why the late declaration of income to HMRC amounted to innocent mistake. On 16 October 2018 Judge of the First-tier Tribunal Foudy granted permission to appeal.

Hearing in the Upper Tribunal

10. I was informed that the Applicant and her husband were in Field House but were outside the hearing room with their young children and were content not to be present. Mr Davison agreed there was no need for any anonymity direction and that the direction previously made could be lifted.

Submissions for the SSHD

11. Mr Kotas relied on the grounds for appeal that the decision of the HMRC neither to impose penalties nor treat the Applicant's various failings in respect to supply accurate information in her tax returns as tax evasion did not mean the Respondent was barred from invoking the provisions of para.322(5) of the Immigration Rules. The Judge had erred in assuming that it was sufficient. He relied on the extract in the grounds taken from para.75 of *Abbasi JR/13807/2016* and the headnote to the judgment in *R (Khan) v SSHD (Dishonesty, tax return, paragraph 322(5)) [2018] UKUT 384 (IAC)*. The Judge had not considered the facts and had nevertheless made an assessment whether the Applicant had been dishonest. He had materially mis-directed himself and the decision should be set aside.

Submissions for the Applicant

12. Mr Davison accepted that in the Applicant's circumstances para.322(5) of the Immigration Rules might be applicable. However, in this particular case the Judge had made findings at paras.26 and 29 of his judgment that there was no evidence the Applicant had supplied false figures, having sought to amend a tax return and rectify any under-payment of income tax.
13. The Judge had found there was no evidence to show the Appellant had given false figures to the SSHD in her applications for further leave. There was evidence at page 34 of the Appellant's Bundle that she had paid tax on all of the earnings identified at the foot of page 3 of the SSHD's reasons for refusal. The Applicant had not avoided or evaded any tax liability or been dishonest in her dealings with HMRC.
14. I indicated that I did not need to hear a response on behalf of the SSHD.

Findings and Consideration

15. Mr Davison for the Applicant quite rightly accepted that para.322(5) could apply but submitted that in the Applicant's circumstances it was not applicable. The Judge found that it was not applicable because he considered the evidence showed that the Applicant had not avoided or evaded any tax liability. He did not assess whether the Applicant's failure to supply accurate figures for three consecutive tax terms ending on 5 April 2013 constituted conduct or character making it undesirable to permit the Applicant to remain in the United Kingdom or otherwise unsuitable for the grant of further leave with reference to Appendix FM. He did not address the Applicant's delay in amending her tax returns and her explanation for it which from paragraph 23 of his decision would appear to amount to not following the advice given to her by her then accountant.
16. The Judge's treatment of the issue whether the Applicant had used false figures in her applications to the SSHD for further leave to remain is brief. At paragraph 29 he referred to the Respondent's allegation that the Applicant had given false figures for her income in her applications for further leave. Given the initial apparent discrepancy in the figures given by the Applicant to HMRC, the Judge needed to address the legal and evidential burdens of proof which he did not.
17. Given the concerns the SSHD had about the Applicant's disclosures to HMRC there was reason to query the figures the Applicant had used in her further leave applications.
18. The evidential requirements in connection with Tier 1 (General) Migrant applications were relaxed until changes to the Immigration Rules on 6 April 2015. The SSHD's concerns about the weight which could be given to representations by the Applicant of her income were justifiably raised and at that point the obligation was on the Applicant to evidence to show that her declaration to the SSHD of her income was accurate. The Judge noted there was no evidence to support the income figures used in the further leave applications and in this light, the Judge's treatment of this aspect of the reason of the SSHD's original decision was in error.
19. For these reasons the decision cannot stand and is set aside. The appeal will need to be heard afresh and in the circumstances, I consider the safest course be to direct that no findings of fact are preserved.
20. The Applicant's evidence is not sufficiently complete properly to establish how much she earned in the periods relevant to her further leave applications of 2011 and 2013. The issue of the declarations to SSHD of her income is an essential part of the reasons for the SSHD's refusal to grant indefinite leave. Having regard to the extent of the evidence which would need to be considered and the findings of fact to be made thereon, it is appropriate to remit the appeal for hearing afresh to the First-tier Tribunal.

Anonymity

21. The anonymity direction previously made is not necessary and the Appellant and the Applicant agreed it may be lifted.

Directions

22. For the rehearing in addition to any directions which the First-tier Tribunal may make, the Applicant is directed to produce documentary evidence to show receipt by her of the income declared to SSHD in her 2011 and 2013 applications for further leave by way of reference to personal bank statements as well as payslips, company accounts and bank statements and to produce a schema to enable the Judge readily and quickly to identify the claimed receipts.
23. The attention of the parties is drawn to the judgments in *Russell Dadzie, Rhoda Parker-Wilson v SSHD* [2018] CSOH 128 and *R (Khan) v SSHD (Dishonesty, tax return, paragraph 322(5))* [2018] UKUT 00384 (IAC).

SUMMARY OF DECISION

The decision of the First-tier Tribunal contained errors of law and is set aside.

The appeal is remitted to the First-tier Tribunal for hearing afresh with no findings of fact preserved.

No anonymity direction.

Signed/Official Crest

Date 11. i. 2019

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal