



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/07433/2019
HU/00791/2019

THE IMMIGRATION ACTS

Heard at Field House
On 31st January 2020

Decision & Reasons Promulgated
On 28th February 2020

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

JALPAN DHARMESHKUMAR PATEL
MEGHA SHIRISHBHAI JANI
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Lam of Counsel, instructed by Raffles Haig Solicitors
For the Respondent: Mr P Deller, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants appeal with permission against the decision of First-tier Tribunal Judge James promulgated on 6 August 2019, in which the First Appellant's appeal against the decision to refuse his human rights claim dated 10 April 2019 (following on from the refusal of his application for indefinite leave to remain as a Tier 1 (General) migrant dated 26 February 2018) and the Second Appellant's appeal

against the decision to refuse her application on human rights claim dated 19 December 2018; were dismissed.

2. The Appellants are both nationals of India, who are husband and wife. The First Appellant entered the United Kingdom on 2 October 2007 as a Tier 4 (General) Student with leave to remain as such until 31 January 2010. He was then granted leave to remain as a Tier 1 (Post Study Worker) to 22 January 2012 and as a Tier 1 (General) migrant to 22 June 2013 and then to 14 August 2017. The First Appellant then applied for indefinite leave to remain in the same category, which was refused under paragraph 245CD of the Immigration Rules and by reference to paragraphs 19(i) and (j) of Appendix A of the Immigration Rules. In essence, the Respondent did not accept that the First Appellant's self-employed earnings were genuine. The Respondent made a further decision refusing the First Appellant's human rights claims on 10 April 2019.
3. The Second Appellant came to the United Kingdom on 26 March 2009 as a dependent of the First Appellant and was granted leave to remain in line with him as a dependent up until 14 August 2017. Her application was initially refused in line with the First Appellant on 26 February 2018, following which there was further consideration of her human rights claim. In summary, the Respondent found that the Second Appellant would be returned, together with the First Appellant and their child as a family unit and as such there would be no breach of their right to respect for family life. In terms of private life, the requirements of paragraph 276ADE of the Immigration Rules were not met. The Second Appellant had family in India, had spent the majority of her life there and would face no very significant obstacles to reintegration on return. The child was not a qualifying child and the best interests were considered to remain with the Appellants. There were no exceptional circumstances to warrant a grant of leave to remain.
4. Judge James dismissed the appeals in a decision promulgated on 6 August 2019 on all grounds. I return below to the detail of that decision, but in summary, the First-tier Tribunal did not accept that the First Appellant's were genuine and that he had deliberately sought to mislead the Respondent as to his income. In relation to human rights, the family would return together to India and it would be in the best interests of the child to remain with the Appellants. There was no disproportionate interference with the right to respect for private life and the Appellants could not satisfy the requirements for a grant of leave to remain on the basis of long residence given that their leave to remain had expired on 14 August 2017.

The appeal

5. The Appellants appeal on two grounds. First, that the First-tier Tribunal made 11 factual errors in the decision which amounted to errors of law as cumulatively these errors affected the credibility assessment. The errors specified are as follows:
 - (i) In paragraph 19(a), the First-tier Tribunal refers to the First Appellant as a pharmacist with an assumed higher level of pay than he actually earned as a pharmacy assistant earning £11 per hour;

- (ii) In paragraph 19(b), the First-tier Tribunal refers to the First Appellant not realising the age of the child to whom he was giving language tuition on an ongoing basis, whereas the First Appellant's claim was that he made a mistake about the child's age in interview only;
 - (iii) In paragraph 19(d), the First-tier Tribunal refers to a difference in claimed earnings, which was explained by the Appellant as the gross and net income figures, rather than a discrepancy;
 - (iv) In paragraph 19(h), the First-tier Tribunal relied upon the First Appellant's failure to apply for administrative review of the initial refusal of his application for further leave to remain, however the Appellant had accepted that there was no case working error given the mistake he made about the child's age in interview, such that there were no grounds to pursue an administrative review;
 - (v) In paragraph 19(p), the First-tier Tribunal relied upon contradictory dates about the commencement of language tuition, however the First Appellant's evidence referred to his financial accounting period separately to the date on which he commenced tuition;
 - (vi) In paragraph 19(q), the First-tier Tribunal relied on a contradiction in the First Appellant's evidence, referring to earnings of £12,600 and also to £10,475, which as above were the gross and net earnings and no contradiction in the amounts claimed. Further no reasons were given for this finding;
 - (vii) In paragraph 19(s), the First-tier Tribunal irrationally inferred from the letter from the First Appellant's employment that there was no reason as to why the First Appellant left work early or did not choose to work additional hours as a pharmacist;
 - (viii) In paragraph 19(t), the First-tier Tribunal relies on the First Appellant not claiming any income from self-employment in the year 2012/13, however his consistent evidence was that this was in 2013/14;
 - (ix) In paragraph 19(u), the First-tier Tribunal failed to have regard to the bank statements available in the Appellants' bundle;
 - (x) In paragraph 19(w), the First-tier Tribunal had failed to have regard to the reasons for the language tuition;
 - (xi) In paragraphs 19(y) and (z), the First-tier Tribunal placed reliance on matters not put in issue by the Respondent, namely the lack of evidence of financial transactions with the application for leave to remain in 2017 which had been accepted by the Respondent and to the contrary, the only issue was whether income was genuinely from tuition.
6. The second ground of appeal is that the First-tier Tribunal reached a perverse and/or irrational finding in paragraph 19(e) of the decision, concluding that consistent answers given to identical questions underlined credibility rather than supporting it.
7. At the outset of the oral hearing, Mr Deller on behalf of the Respondent accepted that there were some factual errors in the decision of the First-tier Tribunal but indicated

that the real issue was whether any of these were material to the outcome of the appeal. Overall, it was submitted that the errors do not undermine the adverse credibility findings made against the First Appellant, either on their own or cumulatively such that overall the conclusion reached was safe and open to the First-tier Tribunal on the evidence before it.

8. On behalf of the Appellants, Mr Lam submitted that the factual errors were all relied upon in relation to credibility and were material to the assessment of the Appellants' credibility. The written grounds of appeal were relied upon, with some additional detail and reference to the underlying documents before the First-tier Tribunal.

Findings and reasons

9. I deal in turn below with each of the factual errors claimed by the Appellant before assessing their cumulative impact on the credibility findings made by the First-tier Tribunal. At the outset it is however necessary to make some general observations about the First-tier Tribunal decision. First, the section headed findings of fact contains in paragraphs 10 to 18 details of the hearing and recitation of the evidence before the First-tier Tribunal, with findings only actually beginning at paragraph 19. Paragraph 19 is itself divided in to 26 sub-paragraphs said to contain the Tribunal's reasons for not accepting that the First Appellant earned the money claimed for private language tuition. The style adopted in those paragraphs is less than helpful to any reader, with incredibly long sub-paragraphs as well as sentences which at their longest extend to over a page and a half of text. On any view, the approach adopted provides far less clarity in the reasons given than should have been the case, albeit the grounds of appeal do not go so far as to claim that the decision fails to allow the Appellant to understand the reasons why his appeal was dismissed as a freestanding error of law. Although it is arguable that this decision falls short of the standards normally to be expected, it is not so bad that the reasons can not be discerned on a careful reading of the decision as a whole.
10. In paragraph 19(a) of the decision, there is a factual error as to the First Appellant's primary occupation, being recorded as a pharmacist rather than a senior pharmacy assistant. His evidence was only ever on the basis of being a senior pharmacy assistant earning around £33,000 for 45 to 47 hours work a week. There was no direct evidence of the First Appellant's hourly rate in his employment in this capacity and he claimed to earn £30 an hour for language tuition. However, the inference that the First Appellant could earn more as a locum pharmacist and not work so far from home providing language tuition is based on an error of fact and not sustainable on the evidence before the First-tier Tribunal.
11. In paragraph 19(b) of the decision, the First-tier Tribunal finds it highly implausible that the First Appellant made a mistake in the age of the child he was providing language tuition for, thinking she was five years old instead of seven. It was found not to be a simple one-off mistake but in the context of knowing the family for a number of years and purchasing age appropriate learning materials for a five-year old, not realising for ten months that the child was older. However, the First Appellant has only accepted a mistake in stating the age of the child in his interview

with the Respondent and not an ongoing mistake as to her age during the period of language tuition. Further, it is clear from paragraph 19(x) of the decision that there was no evidence before the First-tier Tribunal of the relevant age for materials used, only some pictures of books/materials which were not labelled. In these circumstances, it would appear that the First-tier Tribunal misunderstood the First Appellant's claim and/or did not engage with the claim that this was a mistake in interview only or in the alternative provide reasons for rejecting this explanation.

12. In relation to paragraph 19(d), it is necessary to set out the findings of the First-tier Tribunal in more detail, although given this sub-paragraph is almost two pages long I do not set it out in full. The first sentence accounting for more than half of the sub-paragraph is a verbose summary of the reasons for refusal given by the Respondent, which includes the Respondent's identification of a discrepancy in earnings declared to the Respondent in his application of £12,600 and that declared during his interview of £7000, a difference of some £5600; and discrepancies between the First Appellant's accounts and what he stated in interview as to business expenses. The actual findings of the First-tier Tribunal start about two thirds of the way down on page 8 of the decision and are as follows:

"... Having heard the oral evidence of both witnesses, and reviewed the Appellant's many documents submitted, and his explanations for the concerns raised by the Respondent, I support the concerns and reasons for refusal raised by the Respondent in the 26 February 2018 refusal decision due to the many discrepancies in the net and gross figures claimed to be earned, as well as expenses which vary, the confusing and odd decision to issue invoices all with the same number, and to issue them post-dated up to six months later, and to only have one child of seven years of age as a single client during this period, and that the parents of that child would have unusually chosen not to speak to the child in their own mother tongue to enable her to speak the parental language, or that such an aged child would require such intensive and time heavy tutorials on a daily basis over and above her daily mandatory schooling, let alone that a child of such tender years would be able to pay attention, sit still, or even have the cognitive skills to learn in such a high pressured environment and timetable;"

13. The First-tier Tribunal does identify the discrepancies relied upon, albeit by reference to the Respondent's reasons for refusal letter, in both claimed earnings and claimed business expenses. The First Appellant claims that in relation to earnings, there was no such discrepancy, only a difference between accounting periods as explained in paragraph 17 of his witness statement, that the figure of £7000 was correct as to the amount earned until March 2017, the end of the tax year, the figure of £12,600 being the accounting year from July to July. However, when one looks at the interview record, the First Appellant only stated that he earned £7000, including in answer to question 11, "what was your total income from your S/E work during you current T1 Gen app? 01 August 2016 to 31 July 2017?". The First Appellant's explanation is also not supported by his HMRC tax calculation for the year ending 5 April 2017 in which £10,745 was declared as profit from self-employment, which he confirmed in his written statement was correct. For these reasons, it was open to the First-tier Tribunal to find that there was a discrepancy in the earnings figures claimed by the

First Appellant between his application and interview and his explanation for this does not withstand scrutiny on the evidence before the First-tier Tribunal.

14. In paragraph 19(h) of the First-tier Tribunal's decision, it is noted that the First Appellant could have applied for administrative review of the refusal of his application in 2018 but failed to do so and seeking to challenge it late in the course of this appeal was found to be a concern. The First-tier Tribunal in this part of the reasoning has simply recorded the fact that the First Appellant did not seek to challenge the previous refusal on the grounds now raised. That is not disputed and at its highest, the First Appellant's written statement simply accepts that there was a mistake in the age given in interview but does not expand further to explain that he therefore accepted that there were no caseworking errors in the refusal in 2018 or that this was the reason why he did not seek administrative review of the refusal. Paragraph 19(h) of the decision therefore contains no error of fact or error of law.

15. In relation to paragraph 19(p) of the decision, the Appellants claim that the First-tier Tribunal again relied on contradictory dates when in fact there was no discrepancy, simply the same difference as identified previously between the accounting year, tax year and actual work dates. The finding was that:

"The dates claimed by the Appellant when he provided tuition to [the child] are contradictory in his interview, statement and oral evidence, referring to August 2016 to July 2017, and also that he did not commence teaching her until 16 October 2016. In turn this contradicts the figures claimed to have been paid in the post-dated cheques;"

16. In interview, having been referred to invoices dated 7 December 2016, 23 December 2016 and 3 January 2017, the First Appellant stated that he started tuition at the end of September or first week in October but had agreed that if there was a result from the tuition after the first two months, he would be paid by back dated cheque. There is nothing express in any of the written statements about the dates tuition was provided. In oral evidence, the First Appellant stated that he started tuition on 16 October 2016 which continued to July 2017. At the oral hearing before me, the only submission was, as per other claimed factual errors, that there was simply a difference in the accounting year and tax year rather than any discrepancy. Counsel did not however identify any express evidence on this point in the written statements nor consistency in the sources of evidence identified in paragraph 19(p) of the decision. In these circumstances, I find that there was no error of fact by the First-tier Tribunal and to the contrary, it was open to it to find that there was an inconsistency in the evidence as to the start date of language tuition.

17. In relation to paragraph 19(q) of the decision, the Appellants made a similar point as that in relation to paragraphs 19(d) and (p) that there was no discrepancy, only a difference in accounting periods. The finding by the Tribunal was that:

"The Appellant contradicts himself in his written and oral evidence of how much he was paid by [Mr X] for tutoring his daughter, referring to £12,600 and also £10,745. Which again in turn contradicts the figures in the post-dated cheques referred to as issued by [Mr X];"

18. Contrary to the grounds of appeal and oral submissions, the First Appellant had not expressly explained the difference between these two figures. Instead, in his written statement, in paragraph 7 he stated that his declaration of self-employed earnings of £10,745 was not an error and later in paragraph 17, that total earnings for the accounting year were £12,600. His written statement was internally inconsistent on this without express reference to accounting periods, or the alternative explanation that one is a net earnings figure and one a gross earnings figure. In any event, there was a clear discrepancy in the First Appellant's evidence before the First-tier Tribunal as to what he was paid, for which there was no clear explanation and the finding that there was a contradiction was clearly open to the First-tier Tribunal to make. Further, the Appellants have not challenged the finding that there was a contradiction between earnings and post-dated cheques.
19. In paragraph 19(s) of the decision, the First-tier Tribunal deals with the evidence of someone that the First Appellant used to work with who confirmed that he left work at 4pm on alternate Thursdays for a personal matter. It is taken as a point adverse to the First Appellant that the statement failed to address why the First Appellant chose not to work additional hours or overtime as a pharmacist or why he chose to leave work early. This paragraph repeats the factual error in paragraph 19(a) as to the First Appellant's employment and also includes an unfair adverse inference, as there is no reason as to why the letter confirming the First Appellant's hours of employment could or should have contained information as to the First Appellant's motives for leaving early or not working overtime. That is a matter for the First Appellant to give evidence on and not something which required corroboration from his employer/a work colleague. The adverse finding in paragraph 19(s) does therefore contain an error.
20. Paragraph 19(t) of the decision contains a clear factual error, referring to the Appellant claiming not to have earned any income for the tax year 2012/2013 whereas the only evidence before the First-tier Tribunal was that he did not claim any income in the tax year 2013/14. However, the main findings in paragraph 19(t) which are adverse to the First Appellant are in relation to the lack of witness statement or attendance at the hearing of a person previously engaging the First Appellant for language tuition for a younger sibling and a lack of explanation as to why the evidence of this that was provided was produced so late.
21. The Appellants state that in paragraph 19(u) of the decision, the First-tier Tribunal fails to have regard to the bank statements available and in circumstances where no issue has been taken previously with bank statements. The findings in paragraph 19(u) of the decision refer to the lack of detailed evidence of language tuition in 2012/13, in particular the lack of information on invoices, the same reference numbers used, the lack of any bank statements from the client showing payment or bank statements from the First Appellant showing receipt, no accounts for this period and no details in relation to the HMRC declarations. The Appellants' bundle contained three invoices, each for £1000, dated 1 December 2012, 15 January 2013 and 20 February 2013; and copies of the First Appellant's bank statements from 3 December 2012 to 18 February 2012. These bank statements contain four deposits of

£1000 on 5 December 2012, 13 December 2012, 7 January 2013 and 16 January 2013. The deposits do not clearly or expressly correlate to the invoices and there was no explanation from the Appellants as to these documents beyond the statements being described as 'showing payments received' from the client in the index to the bundle. On this evidence, the First-tier Tribunal was entitled to find that there were no bank statements for the First Appellant showing receipt of the sums in the invoices and there is no challenge to the remaining findings about lack of other documents and detail. There is therefore no error of fact or law in paragraph 19(u) of the decision.

22. In relation to paragraph 19(w), the Appellants do not claim any error of fact, but that the First-tier Tribunal simply failed to have regard to the evidence as to why tuition was needed for the child. The evidence is however recorded in the decision, in particular in paragraph 18, that the parents were worried about the child's ability to cope in school in India as she could not read or write Hindi or Gujarati and there was nothing to suggest that this was not taken into account by the First-tier Tribunal. It is also not inconsistent with the finding in paragraph 19(w) questioning the need for high intensity tuition (against the background of other findings) given that the child was also being taught in English in India. Paragraph 19(w) discloses no error of fact or law.
23. Finally, the Appellants challenge the findings in paragraphs 19(y) and (z) of the First-tier Tribunal's decision for relying on matters not challenged by the Respondent. Again, this is not a claimed error of fact but more of a procedural concern that matters have been relied upon in circumstances where they were not previously in issue, however, contrary to submissions on behalf of the Appellants, there is nothing to suggest the Respondent had accepted any of these points or other documents not before the First-tier Tribunal. Paragraph 19(y) of the decision deals with the lack of bank statements from the First Appellant for the relevant dates between 1 August 2016 and 31 July 2017, which would have been available to him to produce to show his claimed earnings from self-employment. Paragraph 19(z) deals with the very limited evidence as to the HMRC tax calculation and inconsistencies between that and the First Appellant's evidence. In neither paragraph is there any reliance on matters previously accepted or even undisputed by the Respondent and both simply reflect the Appellants' failure to submit evidence supporting the claimed genuineness of earnings from self-employment. The findings in these two paragraphs contain no error of fact, no procedural irregularity and no error of law. Instead, they contain findings that were open to the First-tier Tribunal on the very limited evidence before it as to the First Appellant's earnings and the genuineness of the same.
24. Overall, in relation to the eleven matters raised in the first ground of appeal, although there are some factual errors and unfair adverse inferences drawn, there remains a wide range of reasons as to why an adverse credibility finding is made and why the First-tier Tribunal finds that the earnings are not genuine or from genuine self-employment. There are a significant number of findings in paragraph 19 which have not been challenged at all by the Appellants and significant and weighty findings as to discrepancies in the evidence and lack of supporting evidence on key

issues such as earnings, expenses and payments as well as the practicalities and need for the extent of claimed language tuition, that the overall conclusions reached by the First-tier Tribunal would inevitably have been the same even without the errors identified.

25. As to the second ground of appeal, the findings in paragraph 19(e) were as follows:

“... I also do not accept that the child was given differing methodological didactic approaches as claimed by the witnesses, e.g. use of an ipad or outdoor trips, as these were generic identical claims in their statements and oral evidence without any detail provided. The oral evidence given was repeated as if by rote and appeared to be ‘learned’ rather than spontaneously referred to in the personal words of the individual witnesses, such that this rather rigid repetitive approach tended to undermine the credibility of their claims;”

26. Whilst it may be the case that witnesses who given consistent answers to identical questions in evidence could be found to support the credibility of a claim; that is not necessarily the case and answers which are identical using the same phrase for example, can lawfully be found to undermine credibility if it displays co-ordinated or pre-planned evidence. In the present appeal, the First-tier Tribunal has given reasons for such a latter finding which discloses no error of law in approach. The written statements of the First Appellant and parent/client are very similar and the First-tier Tribunal had the benefit of oral evidence from both to compare and form an overall impression of the quality of the evidence. It is a matter of judgment for the First-tier Tribunal to assess the evidence, including oral evidence before it. In any event, for the same reasons as given above, there is a plethora of reasons for the adverse credibility findings made and overall conclusions which would be unaffected even if there was any error disclosed in paragraph 19(e) of the decision.

27. Overall, for the reasons set out above, I do not find any material error of law, individually or cumulatively, that could have affected the outcome of this appeal.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeals is therefore confirmed.

No anonymity direction is made.



Signed

Date

27th February 2020

Upper Tribunal Judge Jackson