



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/08468/2019 (P)

THE IMMIGRATION ACTS

Decided on a rule 34
On 14 October 2020

Decision & Reasons Promulgated
On 22 October 2020

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

MD ALINUR RAHMAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. Directions were issued by the Upper Tribunal on 22 June 2020 indicating the provisional view, in light of the need to take precautions against the spread of Covid-19 and the overriding objective, that this case was suitable to determine whether there was an error of law in the First-tier Tribunal's decision and if so, whether that decision should be set aside, without a hearing.
2. In written submissions filed on 17 July 2020, the Appellant objected to the provisional view that the error of law issues can be determined without a hearing and submits that an oral hearing is required. The reasons given for this are that (a) the appeal concerns a serious allegation of dishonesty; and (b) there were comments within the order granting permission to appeal, that aspects of the grounds had less weight than others and it was of concern to the Appellant that he should have an opportunity to address any such issues orally before the Upper tribunal as the

written submission procedure only responds to anything in writing from the Respondent, rather than any questions or concerns from the Upper Tribunal. In any event, the Appellant did, in accordance with the directions, make detailed written submissions as to the substance of the appeal.

3. The Respondent has not replied at all to the directions of the Upper Tribunal, which were resent to her on 24 September 2020, such that there has been no objection to the determination of the issues identified above on the papers in this case, however no has there been any written submissions on the substance of the appeal.
4. In my view, this is a case in which it is suitable for the issues of whether the First-tier Tribunal's decision materially erred in law and if so, whether the decision should be set aside, to be determined on the papers on the basis of the written submissions made. This is in light of the unprecedented circumstances surrounding Covid-19 and the need to take precautions to prevent the spread of the disease; is in accordance with the overriding objective for the Upper Tribunal to deal with cases fairly and justly in rule 2(1), (2) and (4) of the Tribunal Procedure (Upper Tribunal) Rules 2008 and in circumstances where on the facts; the grounds of appeal relied upon, expanded in the written submissions on behalf of the Appellant, are clear and comprehensive, from which, for the reasons set out below, I find an error of law in the decision of the First-tier Tribunal which requires the decision to be set aside. This decision has therefore been made under rule 34 to avoid any further delay to the determination of the issues.
5. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Randall promulgated on 8 January 2020, in which the Appellant's appeal against the decision to refuse his human rights claim dated 30 April 2019 was dismissed.
6. The Appellant is a national of Bangladesh, born on 14 February 1978, who first arrived in the United Kingdom with entry clearance as a student on 15 October 2005, with valid leave as such to 30 November 2008. The Appellant was granted further periods of leave to remain as a student, as a post-study worker, and as a Tier 1 (General) migrant to 26 October 2019. The Appellant applied for indefinite leave to remain on the basis of long residence on 15 December 2017, the refusal of which on 30 April 2019 is the subject of this appeal.
7. The Respondent refused the application under paragraphs 276B(ii)(c) and para 322(5) of the Immigration Rules on the basis that the Appellant's character and conduct was undesirable for a grant of leave to remain. The reasons for this were that there was a significant discrepancy between declarations made for his self-employed earnings to HMRC as part of his tax return for the year ending April 2011 and to the Respondent in the application for leave to remain for the same period. The Respondent considered that the Appellant had either dishonestly under declared his earnings to HMRC for the purposes of avoiding tax, or overinflated his earnings in his application to the Respondent for the purposes of securing leave to remain. Separately, the Respondent refused the application under paragraph 276ADE of the

Immigration Rules on the basis that there were no very significant obstacles to the Appellant's reintegration on return to Bangladesh and there were no other exceptional circumstances to warrant a grant of leave to remain.

8. Judge Randall dismissed the appeal in a decision promulgated on 8 January 2020 on all grounds. First, the First-tier Tribunal rejected the submission on behalf of the Appellant that the allegations of dishonesty could not be raised following the decision of the Court of Appeal in Ullah v Secretary of State for the Home Department [2019] EWCA Civ 550 as these had not been raised in the previous decision of the First-tier Tribunal relating to this Appellant in 2016. Secondly, that the Appellant's presence in the United Kingdom was not desirable and his application failed under paragraph 322(5) of the Immigration Rules because he had been dishonest in his tax return submitted to HMRC for the year 2010/11, initially declaring self-employed income of only £1345, significantly different to the claimed income for the same period from self-employment made in his application for leave to remain to the Respondent of £34,900. Thirdly, in relation to the Appellant's private and family life claim under Article 8, the Appellant did not meet the requirements of the Immigration Rules for a grant of leave to remain on private life grounds and the family could return as a unit to Bangladesh without any unduly harsh consequences.

The appeal

9. The Appellant appeals on four grounds as follows. First, that the First-tier Tribunal reached an irrational conclusion in paragraph 68 of the decision, overlooking the fact that detailed evidence about the other person with the same name as the Appellant whose tax affairs said to have been mixed up with his, could not have been disclosed in accordance with the stringent data protection laws, specifically that this would not be covered by permissible disclosure in Chapter 2 of the Data Protection Act, nor under the General Data Protection Regulations of 2019. Further, that the First-tier Tribunal failed to consider that data relating to the 2010/11 tax return was not required to have been retained by the professionals involved; and failed to consider that the junior member of staff responsible had been sacked from the firm and had returned to Bangladesh (albeit the evidence of this last point was only included with the application for permission to appeal).
10. Secondly that the First-tier Tribunal reached an irrational conclusion in paragraph 70 of the decision and/or failed to apply the correct standard of proof, by referring to the balance of probabilities and not the requirement that the Appellant provides an innocent explanation with the minimum level of plausibility. The First-tier Tribunal's findings in relation to the Appellant's circumstances and his father's poor health were irrational because it does not necessarily follow that the absence of a visit back to Bangladesh and/or the absence of medical or psychological help being sought by the Appellant at the time, leads to the conclusion that the Appellant was not concerned for his father or distracted by the situation.

11. Thirdly, that the First-tier Tribunal's conduct of the appeal was procedurally unfair, specifically because he was not asked any questions about why he had not been to visit his father (this is expressly recognised in paragraph 70 of the decision) and if he had been asked, he would have been able to explain and provide evidence that he was unable to do so because of a lack of annual leave available to him from his then new job. This information is set out in a written statement by the Appellant submitted with the application for permission to appeal supported by documentary evidence submitted at the same time.
12. Finally, that the First-tier Tribunal failed to consider material evidence before it, namely that contained in the Appellant's written statement that HMRC had assessed his actions as a failure to take reasonable care and had not imposed a penalty on him pursuant to the amendment of his tax returns. It is accepted on behalf of the Appellant that his representative failed to include a letter from HMRC confirming the same such that it was not before the First-tier Tribunal, a copy being provided only with the application for permission to appeal.
13. I pause to note at this stage that although the Appellant has filed further documentation with his application for permission to appeal, and again with written submissions in support of the appeal; no application has been made under Rule 15(2A) to rely on any such further evidence, nor have any submissions be made as to why these further documents should be admitted at this stage. However, in the event, for the reasons set out below, it is not been necessary to have recourse to these documents or rely on them to determine the issue of whether there was a material error of law in the decision of the First-tier Tribunal.
14. As above, no written submissions were filed on behalf of the Respondent in relation to this appeal and I have taken into account the written submissions made on behalf of the Appellant, which in the main were materially identical to the grounds of appeal, with some additional authority and reference to legislation only.

Findings and reasons

15. The first ground of appeal concerns finding in paragraph 68 of the First-tier Tribunal's decision, which states as follows:

"Mr Biggs relied on the letter from ABC Bookkeeping and Accountancy dated 9 October 2019 taking responsibility for the error. However, I find the explanation in the letter, that a junior member of staff mixed up two clients with the name of Rahman, is severely lacking in detail. No other relevant correspondence has been provided; no tax calculations for the other Mr Rahman explaining the mix-up; and no evidence of his tax affairs. I heard no oral evidence from either the junior member of staff or the writer of the letter from ABC, or the other Mr Rahman. The Respondent was thus unable to cross-examine them on the subject. Given the central importance of the actions of ABC in the Appellant's explanation as to why he was not dishonest in his 2010/11 tax return, I find that the lack of supporting evidence from the company, apart from the letter, significantly undermines the claimed explanation."

16. Whilst a number of points made within the paragraph above were unarguably open to the First-tier Tribunal on the evidence before it, in particular that the letter from ABC Bookkeeping and Accountancy was lacking in detail and unsupported by any oral evidence from the author; other points were not rationally open to the First-tier Tribunal. These included adverse reliance on the lack of evidence from the junior member of staff and more importantly the lack of evidence from the other Mr Rahman and about his tax affairs.
17. In relation to the junior member of staff, there was at least some evidence in the Appellant's written statement that he was no longer working for ABC Bookkeeping and Accountancy (albeit the evidence that he had also left the United Kingdom was not before the First-tier Tribunal from any source) and no reasons were given by the First-tier Tribunal as to how or why they could be any reasonable expectation of him therefore giving evidence in the present appeal.
18. More significantly, the First-tier Tribunal fails to consider that ABC Bookkeeping and Accountancy would not be permitted to release the other Mr Rahman's personal details to the Appellant or the Tribunal, nor to disclose any details of his tax affairs or calculations due to data protection regulations (even if they still had the records available). There is no suggestion that there is any known relationship between the Appellant and the other Mr Rahman such that he could contact this person directly to give evidence in support of his appeal.
19. In these circumstances, it was not rationally open to the First-tier Tribunal to draw adverse inferences from the lack of evidence from or about the other Mr Rahman, or directly from the junior member of staff responsible given the practical and legal restrictions on disclosure in relation to these third parties and information about them. Whilst it is possible that the First-tier Tribunal could have lawfully found that the lack of detail in the letter from ABC Bookkeeping and Accountancy, together with the lack of any oral evidence from the author or another employee at the firm was sufficient to significantly undermine the Appellant's claimed innocent explanation for the errors in his tax return; it is not sufficiently certain that the First-tier Tribunal would have inevitably come to the same conclusion on this basis alone, rather than on the basis of the cumulative reasons given in paragraph 68. For these reasons I find an error of law on the first ground of appeal in the findings of the First-tier Tribunal in paragraph 68, which contained reliance on findings not rationally open to it in the wider legal and practical context.
20. The second and third grounds of appeal concern the findings in paragraph 70 of the First-tier Tribunal's decision, which states as follows:

"In reaching this conclusion, I note that I put it to the Appellant and to Mr Biggs that the Appellant, as a bookkeeper/payroll worker/business-planner en route to qualifying in 2015 as a chartered accountant, must have known that, in paying £270 tax in 2010/11, he was making too low a tax payment on an income of nearly £50,000, most of it from self-employment. Mr Biggs responded that the Appellant was distracted by his father's stroke in Bangladesh and by his failure to bring his wife over following his marriage. These may have been distractions and

I note and take into account paragraph 34 in the case of Khan in this respect. However, the Appellant stated that his father suffered his stroke in August 2011 and was critically ill for a prolonged period until 2012. The Appellant was free to travel to see him in that period as he had leave to remain from July 2011 until July 2013. It is clear that he did not go to Bangladesh until October 2012, when he married. Although the question as to whether he went was not put to him in terms, it is clear from his application form that he did not go. Had his father been as ill as he claimed, and, even if he was that ill, had the Appellant been as distracted from his tax affairs as he claimed, in my view it is likely that he would have visited him in Bangladesh. There is also no medical or psychological evidence about the Appellant to support his claim to have been distracted. As to the problems he claims were caused for him by the delay bringing his wife here, he did not marry until October 2012, after the end of the 2011/12 tax year, so the delay in bringing her after marriage could not have been a factor in his failure to recognise the mistakes in the 2010/11 tax submission. Again, he was not prevented from going to Bangladesh to marry her earlier than he did, had he wished to."

21. It can be seen from the part of the decision quoted above that the Appellant was not asked, in terms, whether he went to Bangladesh to visit his father and consequently it can be inferred that he was also not asked any questions about why he didn't make such a visit to his father given his father's ill-health. In the absence of any evidence from the Appellant on this point, the First-tier Tribunal inferred that if the Appellant's father had been as ill as claimed and the appellant had as a result been as distracted from his tax affairs as claimed, it is likely he would have visited him in Bangladesh and further that there was no medical evidence to support the Appellants claim to have been distracted. However, I do not find that these were conclusions which were rationally open to the First-tier Tribunal in the absence of the Appellant being asked about such matters and in the absence of any evidence from him on them.
22. In particular, it is of note that the Appellant claims to have been distracted by concern his father, not that he claimed to have himself suffered any medical or mental health problems as a result and although it may be that a person's own health could be adversely affected in such circumstances, it is not necessarily the case that that would happen. It is of course possible that a person could be adversely affected personally and emotionally without more adverse health consequences in such circumstances. Although medical evidence of the kind suggested by First-tier Tribunal may support or lend more weight to the claim that a person has been unable to diligently attend to all of their affairs as normal, the reverse is not true that no weight can be attached to family circumstances such as these in the absence of such evidence.
23. Further, there is no rational basis or reasons given by the First-tier Tribunal for the view that it is likely that if the situation was as bad as the Appellant claimed, that he would not have visited his father in Bangladesh. There was no consideration of whether there was alternative or frequent contact between family members, or of any

practical or financial restrictions on a visit to Bangladesh at the time, any of which may have given reasons as to why there was no visit, and even in the absence of a visit, one cannot infer that a person may not have wanted to travel if they could such that it would be reasonable to conclude the claim was exaggerated or untrue. The mere fact that the Appellant did not return to Bangladesh when his father was ill does not rationally undermine the Appellant's claim as to the seriousness of his illness, nor of the impact it had upon him in the United Kingdom.

24. Although not expressly relied upon in the grounds of appeal, the additional finding in paragraph 70 that the Appellant's claimed problems in the delay in bringing his wife here were not relevant as he did not marry her until after the end of the relevant tax year, clearly failed to take into account what is commonly known, that the deadline for tax returns is not until the end of January in the following year, which was after the Appellant's marriage.
25. For these reasons, I also find that there was an error of law in the second and third grounds of appeal, that the findings made by the First-tier Tribunal in paragraph 70 were not rationally open to it for the reasons given in the decision.
26. The second ground of appeal also encompasses the claim that the First-tier Tribunal applied the wrong standard of proof in a case such as the present one, by not asking the right question in the context the findings in paragraph 70 as to whether the Appellant had established an innocent explanation meeting the minimum level of plausibility and concluding in paragraph 71 that the Appellant *"has not established on the balance of probabilities that he was distracted as claimed at the relevant time. He has not established on the balance of probabilities that he failed by mistake to check his return."*
27. The First-tier Tribunal's decision does not expressly identify what is known as the ping-pong burden in cases involving an allegation of deception, whereby the Respondent has the evidential burden of establishing a prima facie case of dishonesty, following which the burden shifts to the Appellant to provide an innocent explanation to the minimum level of plausibility, and if he does so, the final legal burden reverts to the Respondent. In the decision, the First-tier Tribunal only refers to the burden of proof being on the Respondent and in relation to both that and the Article 8 claim, the standard of proof is the balance of probabilities with the more serious the allegation made, the more evidence is required. However, in substance, the First-tier Tribunal has identified the different stages.
28. In paragraph 67 there is a finding that the Respondent, by identifying the disparity between the income declared to the Respondent and HMRC, has prima facie, raised the question of the Appellant's dishonesty. In paragraph 69 there is a conclusion that the Appellant has not provided an adequate explanation for the incorrect tax return by reliance on his advisors error; albeit this is by reference to the finding being on the balance of probabilities. The same standard of proof, on the balance of probabilities, has been applied to the Appellant's explanation is as to being distracted from his tax returns and his failure to check his tax returns in paragraph 71 of the decision. In paragraph 73, the First-tier Tribunal finds that the Appellant has failed to establish

any of his explanations to the required standard of proof and has not satisfactorily rebutted the allegations made by the Respondent. It is concluded that the Respondent has therefore discharged the burden of proof upon her to establish dishonesty. None of these references identify the correct test for the second stage of the assessment, which is whether the Appellant has established an innocent explanation to the minimum level of plausibility. At this stage, it is not an assessment of the credibility of the Appellant's evidence on the balance of probabilities and the repeated reference to the latter discloses a further error of law by the First-tier Tribunal. Overall, the First-tier Tribunal's findings and conclusion on dishonesty are materially undermined by the errors identified.

29. On the basis of the findings already made in the first three grounds of appeal, which together require the decision of the First-tier Tribunal to be set aside in its entirety because the errors go to the core of the finding that the Appellant was dishonest, the final ground of appeal as to whether the First-tier Tribunal failed to consider material evidence before it, namely HMRC's response to the amendments of the Appellant's tax returns, adds nothing of substance to the outcome of this appeal. This is a matter which can any event be relied upon by the Appellant if so advised when his appeal is re-made.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal and remit the appeal to the First-tier Tribunal (Hatton Cross hearing centre) for a de novo hearing before any Judge except Judge Randall.

No anonymity direction is made.

Signed *G Jackson*

Date 14th October 2020

Upper Tribunal Judge Jackson