JR-2023-LON-002747

In the Upper Tribunal (Immigration and Asylum Chamber) Judicial Review

In the matter of an application for Judicial Review

The King on the application of
Debabrata Dutta

Applicant

and

Secretary of State for the Home Department

Respondent

ORDER

BEFORE Upper Tribunal Judge Landes

UPON hearing from Mr Jay Gajjar, Counsel instructed on behalf of the Applicant by Wildan Legal Solicitors, and Mr Gavin Dingley, Counsel instructed on behalf of the Respondent by the Government Legal Department at a hearing on 17 October 2024
AND UPON considering all the documents filed
AND UPON judgment being handed down on 21 November 2024

IT IS ORDERED THAT:

(1) The application for judicial review is dismissed for the reasons in the attached judgment.

(2) The Respondent will pay the Applicant's reasonable costs up to and including 19 December 2023 to be assessed if not agreed.

(3) The Applicant will pay the Respondent's reasonable costs after 19 December 2023 to be assessed if not agreed.

(4) There was no application for permission to appeal. In any event, I have considered, and refused, permission to appeal, because there is no arguable error of law in my decision.

Signed: A-R Landes

Upper Tribunal Judge Landes

Dated: 21 November 2024

The date on which this order was sent is given below

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date): 21/11/2024

Solicitors:
Ref No.
Home Office Ref:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a point of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).

Case No: JR-2023-LON-002747

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1WR

21 November 2024

Before:

UPPER TRIBUNAL JUDGE LANDES

- -

Between:

THE KING
on the application of
DEBABRATA DUTTA

Applicant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- -

Jay Gajjar
(instructed by Wildan Legal Solicitors), for the applicant

Gavin Dingley
(instructed by the Government Legal Department) for the respondent

Hearing date: 17 October 2024

- -

J U D G M E N T

- -

Judge Landes:

Introduction

1. The applicant seeks, by his grounds of review, amended on 12 February 2024, judicial review of the entry clearance officer's revised decision of 19 December 2023 refusing his application of 26 September 2023 for entry clearance as a visitor.

2. The entry clearance officer refused the application under paragraph V4.2 (a) and (c) of Appendix V Visitor on the basis that the officer was not satisfied the applicant was a genuine visitor who would leave the UK at the end of his visit or was genuinely seeking entry or stay for a purpose permitted under the visitor route.

3. In his amended grounds of review the applicant submits that the decision to refuse was Wednesbury unreasonable and also refers to various factors which, it is said, show that the matter had not been considered in the round.

Background

4. The Applicant is an Indian national born on 24 January 1975. He graduated as a lawyer in 1999, and he became a member of the Bar Council of West Bengal in 2000. He says he has been practising as a lawyer for over 20 years with a focus on tax law. He is married and lives with his wife and their daughter who is now 14. He reports having other family members in India, specifically a mother, an elder brother, two elder sisters and their families. He owns his home, he also owns some land jointly with his brother-in-law and there is some family property in the family's native village which includes agricultural land. In his spare time, he participates in the Scouting movement as an Assistant State Organising Commissioner and the District Organising Commissioner.

5. The applicant by application of 26 September 2023 applied to visit the UK for 7 days in November 2023 with his brother-in-law to celebrate his brother-in-law's daughter's fifth birthday. According to his covering letter, the little girl lived with his brother-in-law's ex-wife in London and there were family difficulties. The applicant's brother-in-law wanted his daughter to live with him in India and the applicant was going with his brother-in-law to London to speak to the ex-wife and her family so that they could reach an amicable agreement in the child's best interests for her future going forward. The applicant was leaving his own wife and daughter behind in India.

6. In the application the applicant set out the purpose of his visit and his dependants. He said he was self-employed as a legal practitioner earning 288,680 INR a year and he had savings of £12,687. He was planning to spend £1000 on his visit to the UK and the total amount of money he spent each month was 20,000 INR.

7. In the covering letter with the application the applicant set out in detail the purpose of his visit extending to four closely typed pages. He then explained about his profession in a paragraph and stated that his annual income as per tax returns for the last three assessment years was
   2021–2022 RS 2,28,920
   2022- 2023 RS 241,030
   2023- 2024 RS 288,680

8. He said that he had saved a total amount of 13,22,232 rupees and he attached 11 sets of documents as proof, setting out the amounts in each account.

9. He then explained about his scouting activities, his family ties to India, his and his family's property and his daughter's school and activities. He attached further documents to evidence the details of his trip, family photographs, his Bar Council card and enrolment card, academic documents, scouting documents, passports and identity documents for him and his family members, an electric bill for his house and two conveyances which showed that the applicant had in February 2021 purchased land with his brother in law and that in 2006 he had purchased residential land. The applicant declared his belief that the documents demonstrated that he was only intending to visit for family purposes and that his ties to his home country would encourage his return and he assured the entry clearance officer that he would comply with rules and regulations. He highlighted that he had made a minor mistake as to the purpose of his visit in the online form and clarified that the purpose was as set out in his letter.

10. The only documents which on the face of it evidenced income were the bank statements submitted and the three acknowledgements of tax return filing for the relevant 3 tax years.

11. The application was first refused on 16 October 2023. The refusal was challenged by pre-action protocol letter of 26 October 2023 and the respondent by response of 3 November 2023 agreed to reconsider the decision. A further refusal followed on 14 November 2023. That refusal was challenged by pre-action protocol letter of 21 November 2023. The respondent by response of 5 December 2023 explained that they were satisfied that the decision was in accordance with the law.

12. The applicant thereupon on 8 December 2023 brought a claim for judicial review. The claim was served on the respondent on 15 December 2023. On 19 December 2023, the entry clearance officer withdrew the decision under challenge and issued a revised decision.

The decision

13. The material parts of the revised decision now under challenge were as follows:

> *"I have refused your application for a visit visa because I am not satisfied that you meet the requirements of paragraph(s) V4.2 of Appendix V: Visitor because:*
> *You have stated in your application that you wish to come to the UK for 7 days to visit family.*
> *I have considered all of the documents and information provided by you about your personal and economic circumstances, the reasons for your visit and your proposed travel arrangements.*
> *In your application you have stated that you are self-employed with a salary of 288,680 INR (£2,829.61) per year. In support of this you have provided a bank statement in your name (account number ending in 1561). I note that this statement does not show credits in congruent with your stated income; the total of all the transactions into this account for the period it covers, from 17-August-2020 to 3-October-2023, is only 71,919.54 INR (£704.94). This amount is less than one quarter of your yearly income received over a period of more than three years. You have submitted a second bank statement in your name (account number ending in 1582);*

this statement shows a total of 183,008.06 INR (£1,793.82) deposited between 23-August-2023 and 4-October-2023. This is equal to more than seven months' worth of income, or a significant portion of your annual income, received in less than two months' time. I acknowledge that you have stated you are self-employed and that your income may not be regular as a result; however, I must assess your application based on the information you have provided and compare it to the statements you have made in your application. There is a clear discrepancy between your documents and your stated circumstances. The information you have provided has not satisfied me that your self-employment is settled and established in your home country, which damages the overall credibility of the statements made in your application and leads me to doubt that you intend to depart the UK at the end of your proposed visit.

Although you have provided documents which demonstrate your qualifications in your field, and bank statements which demonstrate that you are in receipt of an income, these documents do not establish the source of this income. You have stated that your income is derived from self-employment, but the information you have provided has not satisfied me that the income you have demonstrated is genuinely derived from the source you have declared; this, in conjunction with the discrepancies I have already noted, leads me to doubt that you have given a credible account of your financial or employment circumstances; this further harms the credibility of your application and leads me to doubt your intent to enter the UK as a genuine visitor.

Given the above I am therefore not satisfied that you have demonstrated your circumstances are as declared or are as such that you intend to leave the UK at the end of your visit. This also leads me to further doubt your intentions in travelling to the UK. Your application for a visit visa has been refused under paragraph V4.2 (a) and (c)."

14. There were three material respects in which this decision was different from the November decision:
    (i) The reference to the applicant being unemployed and funding his trip through savings was removed;
    (ii) The reference to being previously refused a visit visa to the UK was removed;
    (iii) The reference at the end of the penultimate substantive paragraph to "*on the basis of that credibility, I have refused your application under paragraph V4.2 of the immigration rules*" was removed.

Relevant procedural history

15. Permission was refused on the papers by Upper Tribunal Judge Perkins. He ordered the respondent to pay the applicant's costs before 19 December 2023 on the basis that the respondent's original decision included assertions that were plainly wrong and disavowed.

16. On renewal of the application Judge Canavan granted permission commenting "*Although it was likely to be open to the respondent to take into account the fact that the applicant's bank statements did not seem to reflect his stated income, it is just arguable that the respondent failed to take into account other relevant considerations relating to the applicant's income. For example, the applicant did not claim to have anything other than a modest income, which was at least broadly consistent with tax returns covering several years. The application was supported with a detailed cover letter detailing his income and savings as well as other assets, such as property. The application was also supported with evidence of his legal qualifications as well as other evidence relating to his family and other ties to India*."

17. The applicant did not comply with directions about filing a skeleton argument and bundle. On 10 October I granted an extension of time/relief from sanctions to enable the skeleton argument and bundle to be filed and extended the time for the respondent to file and serve a skeleton argument.

The relevant law

18. Paragraph V 4.2 of Appendix V reads:

> *"V 4.2. The applicant must satisfy the decision maker that they are a genuine visitor, which means the applicant:*
> *(a) will leave the UK at the end of their visit; and*
> *(b) will not live in the UK for extended periods through frequent or successive visits, or make the UK their main home; and*
> *(c) is genuinely seeking entry or stay for a purpose that is permitted under the Visitor route as set out in Appendix Visitor: Permitted Activities and at V 13.3; and*
> *(d) will not undertake any of the prohibited activities set out in V 4.4. to V 4.6; and*
> *(e) must have sufficient funds to cover all reasonable costs in relation to their visit without working or accessing public funds, including the cost of the return or onward journey, any costs relating to their dependants, and the cost of planned activities such as private medical treatment. The applicant must show that any funds they rely upon are held in a financial institution permitted under FIN 2.1 in Appendix Finance."*

19. Version 13.0 of the Secretary of State's Visitor guidance for caseworkers (issued in July 2023) was in force at the date of the revised decision. It outlines the following list of factors as capable of being relevant to the assessment of whether an applicant is a genuine visitor (p 20)

> "*Assessing an applicant's personal circumstances*
> *See: paragraph V 4.2 of Appendix V: Visitor.*
> *The following factors will help you assess if an applicant is a genuine visitor:*
>
> *• their previous immigration history, including visits to the UK and other countries*
>
> *• the duration of previous visits and whether this was significantly longer than they originally stated on their visa application or on arrival - if this is the case, you should not automatically presume that the visitor is not genuine, but this may be a reason to question the applicant's overall intentions*
>
> *• their financial circumstances as well as their family, social and economic background*
>
> *• their personal and economic ties to their country of residence*
>
> *• the cumulative period of time the applicant has visited the UK and their pattern of travel over the last 12-month period, and whether this amounts to 'de-facto' residence in the UK*
>
> *• whether, on the balance of probabilities, the information and the reasons for the visit or for extending their stay provided by the applicant are credible and correspond to their personal, family, social and economic background."*

20. The guidance also details reasons for doubting why a person may not be a genuine visitor (page 22):

> "*Reasons for doubting whether the applicant is a genuine visitor*
>
> *See: paragraph V 4.2 of Appendix V: Visitor.*

This is not an exhaustive list but may help with your assessment. If:
• the applicant has few or no family and economic ties to their country of residence, and has several family members in the UK - for example a person with most of their family in the UK and no job or studies in their own country may be considered to have few ties to their home country

- *The applicant, their sponsor (if they are visiting a friend or relative) or other immediate family member has, or has attempted to, deceive the Home Office in a previous application for entry clearance, permission to enter or stay*

• there are discrepancies between the statements made by the applicant and the statements made by the sponsor, particularly on points where the sponsor could reasonably be expected to know the facts but does not

• it has not been possible to verify information provided by the applicant despite attempts to do so

• the information that has been provided or the reasons for the visit stated by the applicant are not credible

• a search of the applicant's baggage and vehicle at the border reveals items which demonstrate they intend to work or live in the UK

The case for the applicant

21. In paragraph 11.3 of the amended grounds of review, when submitting that the decision to refuse was Wednesbury unreasonable, Mr Gajjar pleaded that the applicant had explained that his income had varied greatly over the past 3 years and that the figure declared was an average and in any event a consideration of deposits into his bank account over more than a three year period was neither required nor rational. He explained at the hearing that paragraph could be struck through and disregarded. Mr Gajjar did not expand upon paragraph 11.4 of the amended grounds at the hearing or in the skeleton argument – namely that receiving cash funds was commonplace and limited a paper trail.

22. The starting point in Mr Gajjar's skeleton argument (paragraph 13.1) and in his oral submissions was, as evidently submitted to Judge Canavan, that although the respondent took issue with credits not being in keeping with the applicant's stated income, the tax return acknowledgments showed that the applicant's income over three years was largely consistent. He took me through the dates of the tax return acknowledgments evidencing that the first two tax returns were submitted in 2022, long before the application would ever have been thought of. He submitted that the respondent had not considered that the applicant had never claimed to receive anything more than a modest income, the equivalent of less than £3,000 per year, and this was relevant as to whether the entry clearance officer had rationally attached weight to the credits not being in keeping with the stated income.

23. The amended grounds also referred to a contradiction in the decision letter in that the decision letter disputed the credits into the accounts but in the penultimate paragraph it was accepted that the applicant had submitted bank statements which demonstrated that he was in receipt of an income. Mr Gajjar did not develop this point further.

24. The second point in the grounds (paragraph 12) was that the factors therein set out (the purpose of the visit, the applicant leaving his wife and child behind, his relationship with his daughter, that he was a well-educated property owner, with strong community ties and a member of the West Bengal Bar Council) had not been considered in the round. This was developed in the skeleton argument to submit (paragraph 14) that the effect was that the decision maker had failed to have proper regard to relevant considerations. Mr Gajjar submitted to me that the entry clearance officer had not considered the positive factors and, he said, that could not from a public law perspective constitute a lawful decision. He said that except for the generic position at the beginning of the decision letter there was no specific consideration of what on the face of it was a weighty factor. He submitted that despite what was said in the decision letter the cover letter had not been properly engaged with. The applicant had set out in detail the reasons for his visit and his family ties; that had not been engaged with. There were factors pointing in both directions and the entry clearance officer had in effect to carry out a balancing exercise; a balance for and against a conclusion that the applicant was a genuine visitor.

25. Mr Gajjar concluded by saying that the decision simply did not demonstrate the weight which had been attached to the family relationships. It was all very well to say that there was a discrepancy but clearly any discrepancy however minor would not be sufficient, the discrepancy had to be material.

The case for the respondent

26. The detailed grounds of defence set out a reminder of the test for irrationality and that the Wednesbury unreasonableness test could be described as "*whether the decision is outside the range of reasonable decisions open to the decision maker*" which underlined the high threshold for engagement.

27. The grounds submitted that the caseworker had clearly taken into account all relevant circumstances when assessing the application. The applicant had failed to distinguish and explain the substantial discrepancies between declared income and the bank statements relied upon. His financial circumstances were not properly explained. There was nothing (such as invoices) to support the applicant's assertions that the deposits were from his self-employment as a lawyer. The economic background was an important part of the assessment of whether or not the applicant was a genuine visitor.

28. The skeleton argument developed that there was nothing unlawful or unreasonable in the respondent's approach of not finding the applicant reliable or credible because there were clear discrepancies between the documents and the stated circumstances. The submissions on behalf of the applicant were, it was said, simply gripes with the conclusion reached rather than identifying a public law error.

29. In submissions, Mr Dingley highlighted that the discrepancies meant that the respondent was entitled to come to the conclusion that the application was not a credible one. There seemed to be an acceptance

that there were discrepancies. The decision was simply not outside the range of reasonable decisions open to the decision maker.

30. To the second aspect of the claim, the skeleton argument submitted that the requirement to consider relevant matters did not require the decision maker to undertake any particular sort of inquiry, to place any degree of weight, or indeed any weight on particular factors. Mr Dingley submitted to me at the hearing that the second part of considering Wednesbury unreasonableness was the process and there was nothing wrong with the process in this case.

Analysis and decision

31. The entry clearance officer's explanation why they were not satisfied that the applicant was a genuine visitor fell into three parts:
    (i) The discrepancy between the applicant's stated income and the amounts paid into his bank accounts, one account showing barely any receipts and the other showing the equivalent of seven months' worth of income received in less than two months. I observe that it is not suggested that the officer was wrong in their calculation or that there are other documents which had been provided that the officer should have looked at which would have explained matters;
    (ii) Because of the discrepancies the officer was not satisfied from the information provided that the applicant's self-employment was settled and established which damaged the overall credibility of the statements made in the application;
    (iii) The documents did not establish the source of the income so that the officer was not satisfied that the income was genuinely derived from self-employment and taken together with the discrepancies that led the officer to doubt that the applicant had given a credible account of his financial or employment circumstances.

32. I do not consider that there is any contradiction in the refusal letter as averred at paragraph 11.5 of the amended grounds. There is evidently money coming into the applicant's bank account, so it is perfectly right to say that the bank statements demonstrated receipt of an income. The fact of credits into the accounts was not disputed by the entry clearance officer, rather that they did not tally with the amount of income claimed.

33. Visit visa guidance indicates that an Applicant's financial circumstances will help the assessment whether an applicant is a genuine visitor. Self-evidently if an officer is not satisfied that an applicant's financial circumstances are as they have described then this is relevant to the genuine nature of the application. That the applicant had declared a largely consistent income to the tax authorities did not demonstrate that the income was indeed derived from the source declared. There was nothing on the acknowledgment of tax returns to say the source of the declared income other than it was the applicant's income. That the applicant had a legal qualification, and had produced a bar card dated 16 August 2012 and a business card, did not of itself demonstrate that he was receiving an income from legal practice. Whilst it is right that the applicant did not claim to have other than a modest income, the officer's

point was not that the visit could not be afforded, but rather that because of the discrepancies and the lack of evidence beyond the applicant's word of the source of his income, the officer could not be satisfied that the applicant had given a credible account of his financial circumstances. That was an obviously rational deduction and a conclusion to which the officer was entitled to come.

34. The decision letter states on its face that all the documents and information about the applicant's personal and economic circumstances, the reasons for the visit and the proposed travel arrangements had been considered. Mr Gajjar says that the decision maker has failed to have proper regard to relevant considerations, but there is nothing to indicate that the factors referred to by Mr Gajjar were not taken into account. The decision letter said that they were. It is not indicated what "not having proper regard" means save insofar as it is said that the decision maker was bound to give those factors particular weight; there is no authority to say what weight should be given to particular factors. Mr Gajjar described the assessment as a balancing act, but the visit visa guidance does not prescribe any particular way in which the assessment should be carried out, simply that when assessing whether the requirements of the immigration rules are met the burden of proof is on the applicant and the standard of proof to be applied is the balance of probabilities (p 18 of the current visit visa guidance).

35. The assessment of evidence is not ordinarily a balancing act, it is more like building up a picture. Mr Gajjar reminded me that a person may have very little income and assets or indeed family ties in their home country and still be a genuine visitor, but of course in that case an entry clearance officer would be likely to accept that the factual picture was as the applicant had presented it, and then the exercise could in truth be described as a balancing act in the sense that the officer would then be looking at factors which might lead the applicant to overstay/not be a genuine visitor as opposed to factors which might lead the applicant to return. The difference in this case was that on assessing the evidence about the applicant's financial circumstances the officer was not satisfied that his financial circumstances had accurately been declared, in other words the officer was not satisfied that the picture was as the applicant had presented it. Bearing that in mind it was perfectly open to the officer to conclude that because in effect a critical piece of the picture, the applicant's financial circumstances, was deficient, the officer was not satisfied of the credibility of the whole, that is not satisfied of the applicant's intentions.

36. I find that the decision was one which was within the range of reasonable decisions open to the decision maker. For that reason, this application for judicial review is dismissed.

Costs

37. I heard argument about costs because Mr Gajjar submitted that if I was minded to dismiss the application, I should follow the order made by Judge Perkins who, when refusing permission, ordered the respondent to

pay the applicant's costs before 19 December 2023 (see paragraph 15 above).

38. It is right, as Mr Dingley submitted, that the main part of the decision was the same and two of the grounds of claim remained the same even after the decision was amended. However I agree with Judge Perkins that there were obvious errors in the decision of 14 November, stating that the applicant was unemployed and that he had previously been refused a visit visa to the UK. The respondent's response to the pre-action protocol did not refer to their intentions to correct those matters, or to withdraw the decision because of those errors. It could have done. Accordingly, in the original claim, the first two reasons why the decision was said to be Wednesbury unreasonable, were those errors and it was only after the claim was served that the November decision was withdrawn. I therefore agree with Judge Perkins that the applicant should not have to pay for making the respondent withdraw errors in the decision the subject of the original claim.

39. The respondent will therefore pay the applicant's costs up to and including 19 December 2023 to be assessed if not agreed. The applicant will pay the respondent's costs after 19 December 2023 also to be assessed if not agreed. Although I was supplied with a statement of the respondent's costs, they were not broken down by date as far as I could ascertain.

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