



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000724

First-tier Tribunal No: HU/55034/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 27th of September 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

Mr VITAL VISHNUPRASAD PATHAK
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Masoor Fazli of counsel

For the Respondent: Mr Nicholas Wain, a Home Office Presenting Officer

Heard at Field House on 30 August 2024

Order Regarding Anonymity

No anonymity order was made.

DECISION AND REASONS

1. The parties to this appeal will be referred to by their designations before the First-tier Tribunal (FTT) notwithstanding that the respondent is the current appellant.
2. The appellant appeals to the Upper Tribunal with permission of Upper Tribunal Judge Pickup given on 21 March 2024.

Background

3. The appellant first came to the UK as a student in 2007. On 11 May 2022 the respondent refused an application for leave to remain as a Tier 1 HS-General Migrant on suitability grounds. This was because, in providing information to the respondent in support of his application for leave to remain, he had relied on documents which suggested an inflated earnings figure. The appellant appealed this decision but on 20 July 2022 withdrew his appeal.
4. Accordingly, leave to remain was refused on the discretionary ground contained in paragraph 322 (5) of the Immigration Rules (the Rules). That paragraph allows the respondent to refuse an application for leave to remain in the UK based on the applicant's character, conduct or associations and has been used to justify refusal where there are discrepancies between the earnings claimed on an immigration application and the applicant's HMRC records - essentially the position here as contended by the respondent.
5. The application giving rise to the present appeal was made on 21 July 2022 under Appendix FM of those Rules, which allows the applicant who has a genuine and subsisting relationship with a partner in the UK who is a British citizen or settled in the UK, where otherwise the eligibility requirements for leave to remain would have to be met, to apply under the Rules. That provides an exception to the requirements that would otherwise have to be met. As Mr Wain pointed out in the second hearing before the Upper Tribunal (UT), that exception did not apply to this case since the respondent conceded, at least by the stage that this case came before the FTT in the hearing of the appeal before Judge Allen (the judge), that the appellant satisfied the eligibility criteria within the Rules. It was solely the suitability criteria that were in issue.
6. Having applied for leave to remain as the spouse of a UK national or person settled here under appendix FM on 21st of July 2022, i.e. by then his wife, Gargi Vassal Pathak (Mrs Pathak) who had settled here in 2021, this application was rejected on 3 August 2022. That decision triggered the appeal is the FTT in the current case. I was informed at the hearing before the UT that Ms Pathak has since been granted UK citizenship. This had the effect of preventing her maintaining her Indian citizenship, but as Mr Wain pointed out, this had not been in evidence before the FTT.
7. The refusal which gave rise to the present appeal on 3 August 2022 gave rise to the appeal, which followed a hearing on 23 November 2023 at Taylor House before the judge. He/she decided to allow the appellant's appeal. In his/her decision, which was promulgated on 9 December 2023, the appellant was found to satisfy the requirements of the Rules as to suitability as well as eligibility. The decision was dated 9 December 2023 and I assume promulgated on that day.
8. On 27th of February 2024 the respondent appealed the judge's refusal on the basis that to find that the appellant's past failed application as a Tier 1 migrant prevented the respondent relying on any of the facts relied on in support of the conclusion in the earlier refusal by the respondent in May 2022, was an error of law. The previous decision to refuse had been on the discretionary basis that the appellant's immigration application had not been truthful, whereas the current application had been refused on the basis that the HMRC submission had been based inflated earnings. This justified refusal under paragraph S - LTR paragraph 1.6 of the Rules (paragraph 1.6).

9. The appeal to the U T against the judge's decision giving rise to the current appeal was made on 27 February 2024. Judge Pickup gave permission on 21 March 2024 because he was satisfied that the judge had arguably erred in concluding at paragraph 21 of his/her decision that that paragraph 1.6 did not apply as the appeal before him/her had not been based on a false representation in relation to the appellant's immigration application but simply in relation to his dealings with HMRC, which allowed the respondent to refuse leave to remain, In particular, the presence of the applicant in the UK was not thought to be conducive to the public good because his conduct including his "character... or other reasons" made it undesirable to allow him to remain in the UK.
10. On 26 April 2024 the appeal to the UT came before me. Following the hearing, I allowed the respondent's appeal to the extent that I found a material error of law and decided to set aside that decision. However, it was made clear in paragraph 26 of my earlier decision that the judge's findings of fact would be preserved. I gave the appellant an opportunity to file and any updating evidence to supplement those findings provided it was directed to the issues in the appeal - this specifically related to the honesty of the appellant's alleged under- declaration his earnings for the purposes of his HMRC tax return, based on which, his tax liability was to have been assessed.

The second hearing before the UT

11. Mr Wain submitted that the issue I had to consider was whether the appellant had deliberately used dishonesty in relation to his dealings with HMRC. This related to an application relying on his earnings figures in 2011. He reiterated that the appellant qualified under eligibility criteria. He relied on the words "character...or other reasons.". Although paragraph 1.6 was almost identical to paragraph 332 (5) of the Rules, the crucial difference was that a refusal under 322 (5) was a general ground for refusal and a discretionary one whereas the refusal under paragraph 1.6 was a mandatory one. He relied on a bundle of documents containing 22 pages which he has submitted the previous day. Mr Fazli did not object to this since these documents had been referred to in the original appeal which have been heard in 2022. Page 8 of the bundle disclosed that for the year for the tax year 2010 to 2011 the appellant's declared earnings were £34306 whereas they should have been £46479 - an under-declaration of £12173. He said that the appellant's reliance on his accountants' letters to explain the discrepancy was inadequate. For example, he took me to a letter dated 1 July 2011 from JA IT Software Consultancy Ltd that suggested that the appellant was in the business of providing IT services. One of the services he provided to the client at page 15 was "accounting and management services" for the organisation in question! Therefore, it was submitted, the appellant was thus in a strong position to identify his correct earnings.
12. As for the burden of proof, Mr Wain accepted this rested on his client but it was not sufficient for a person alleged to have been dishonest to blame the error on an accountant or other professional. It was accepted that if the appellant was able to give an honest explanation that would be the end of it. But, I was taken to the consolidated bundle at page 190. Mr Wain described this as a "minded to refuse letter". It is dated 24 February 2020 and purports to be in consideration of the of an application made on second September 2016. It

informs the appellant of a number of allegedly false representations made and went into great detail. Unfortunately, the evidence filed in response or in reply to this letter had not dealt with the respondent's concerns sufficiently. This was unfortunate because the respondent had posed a number of questions for the appellant to answer at page 193. Given that the appellant had withdrawn his appeal against the 2022 decision it must be assumed that he was satisfied with it and that earlier decision stands.

13. Turning to the current application, this was for leave remain the basis of his relationship with a family member - namely his wife. His explanation for the discrepancy in the figures was unsatisfactory and I was urged to accept that, in all circumstances, the appellant probably had been dishonest and this made it undesirable for him to remain in the UK and fully justified the "character" and "other reasons" relied on by the respondent.
14. I then heard from Mr Fazli, who relied on the skeleton argument which had been drafted on the appellant's behalf by Mr Slatter (at page 44 of the consolidated bundle). He said there was no application to adduce additional evidence at the hearing before the UT . He acknowledged, when I reminded him, that the findings of fact of the FTT had been preserved. He said paragraph 1.6 had been fully considered by the Court of Appeal in **Mahmood**. However, he and Mr Wain disagreed as to what the court had actually decided in that case. His bold submission was that the that paragraph 1.6 did not cover "false representations" et cetera but this had been covered by paragraph 322 (5). Here, the deception was against the HMRC, if there had been any at all. The application in 2022 was on the basis of figures not being accurate and that had been refused by the respondent. Whatever the nature of the risk deception if used, did not change the nature of the facts. **Mahmood** had involved deception being used in relation to the identity of a particular person - using false national insurance details. Mr Wain later pointed out that in fact paragraph 1.6 had not been in issue at the appeal stage in **Mahmood** as it was conceded that, based on the way the case had been pleaded, that could not be relied upon by the respondent. I was referred to paragraph 13 of the decision in **Mahmood** for details of the factual basis of the respondent's case.
15. His second submission relied on page 97 of the consolidated bundle, which is the letter from his accountant dated 12 March 2018. This, he said provided a plausible explanation for the discrepancy. In any event, the conduct complained of was not dishonest from the appellant's point of view. His accountant took responsibility for the discrepancy in the figures. He accepted that the accountant had not been called to give evidence before the FTT, but the accountant's letter was before the FTT.
16. Secondly, he urged me to consider that the conduct in question was over 10 years ago, that even if it was reckless, the passage of time lessened the weight to be given to it. He said that the appellant was now married to a British national, was working in the UK and had a home which he owned with his wife. There is not enough here for him to meet the threshold for refusal under paragraph 1.6 but even if that were, this is not a case where his presence was conducive to the public good, given his family life here. In entry clearance cases his "slate" would be wiped clean after 10 years and Mr Fazli did not see any reason why that should not be so in a case such as this, which at worst involved false representations as to his earnings rather than blatant dishonesty.

17. Thirdly, he referred to article 8 and said that unjustifiably harsh consequences would be experienced by his client given that his wife would not have Indian nationality and would not have permission to reside there. As an overseas person seeking residence, this was not guaranteed. He said they had been unable to have children but the balance was firmly tipped in his client's favour. He also refer me to the case of **Mahad v Entry Clearance Officer [2009] UKSC 16, [2010] 1 W.L.R. 48, at [10]**. He said that that case was referred to paragraph 52 of **Mahmood** in which Lord Brown and observed that the rules are not construed with the strictness of statutes. I was not convinced of the relevance of this authority, however.
18. Mr Wain responded at some length. He said that there was no evidence from the appellant and none from his accountant, other than the letter in the bundle. Submissions have been made at the FTT that the appellant was a director of several companies but when he was given an opportunity to submit evidence in this regard he did not do so or seek an adjournment for this to be done. He simply proceeded with the appeal.
19. Mr Wain took me to the case of **Balajigari [2019] EWCA Civ 673**, which is referred to in his skeleton argument. That case contained the following propositions:
- 1) The discrepancy in earnings did not itself justify a refusal on suitability grounds but it did call for an explanation. When an explanation had been sought, but not forthcoming or was unconvincing, it may be legitimate at that stage to infer dishonesty. In that event, the position is not that there is a legal burden on the applicant to disprove dishonesty. The Secretary of State had to decide whether the discrepancy or the lack of explanation satisfied him or her that that the applicant had indeed been dishonest (paragraph 42);
 - 2) Each case must be decided on its own facts, but where there was honest discrepancy, it would be unlikely that the tribunal would be satisfied by a mere assertion. In particular, here an appellant who relied on an accountant who said simply: this was "a mistake" without a fully particularised explanation of what the mistake was and how it had arisen (paragraph 106) would probably not be found to have acted honestly.
20. Here, it was submitted, the appellant had relied on blaming a junior member of staff. This was mere assertion and was not good enough to satisfy the tribunal. He had submitted a tax return in 2011 which contain material errors and there was no evidence from a member of the accountant's staff to back up the assertion. Little weight should therefore attach to the document that had been supplied dated 12th of February 2018 (at page 97). This was two years before the respondent's letter at page 191- 197 of the consolidated bundle, which sought specific information from the appellant in a number of questions. It was submitted that the refusal of 10 May 2022 followed from this. The appellant had launched an appeal against the refusal but this had not been pursued. I was reminded that inadequate financial information had been supplied, including in relation to the VAT. I was referred to the grounds of

appeal to the UT at 17 - 22 of the consolidated bundle. The finding of dishonesty under section was linked with section 117B (1) of the Nationality, Immigration and Asylum Act 2002 (2002 Act). That section provided that the maintenance of effective immigration controls was in the public interest in all cases.

21. The appellant's personal circumstances were that he is married to an Indian with British nationality and for his appeal to succeed he would need to show that his family life outweighed all other considerations under the Rules. It was accepted that SLT- R 1.6 did not apply in relation to an earlier application for leave to remain but it did apply here. This was not an application where paragraph 322 (5) was relied on. I was taken to page 203 of the consolidated bundle which set out succinctly the basis of the respondent's objection to the appellant's application for leave to remain. Clearly, dishonesty had a number of different aspects but dishonesty when it came to HMRC went to the heart of the system and it was clearly not in the public interest for the appellant to be allowed to remain into the UK. The respondent had not relied in his response to this application on paragraph 322 (5) as that was a discretionary ground, although in identical or very similar terms. The eligibility requirements were met here rather than "not met". Paragraphs 1.6 did apply in the sense that the respondent was entitled to rely on it, as he had. Paragraph 58 of **Mahmood** explained the basis of that decision as it could be represented by Mr Fazli. This explained that when the hearing had taken place before the FTT it had been concerned with the different paragraph than 1.6- LTR 4.2. Mr Jarvis, who represented the respondent in that case, had after the second hearing clarified by written submissions that, given his position, the respondent did not consider he could rely on paragraph 1.6. Accordingly, that paragraph had not been relied on by the respondent in that appeal and it was not directly analogous to this case, therefore. There is clearly a distinction between dishonesty and false representation but this case was about dishonesty with HMRC. I was again refer to FAQ page 203 of the consolidated bundle. The dishonesty alleged in the case of **Balajigari** , to which I was particularly referred, was considered at paragraph 42. That paragraph emphasised that it was open to the respondent to infer dishonesty where the appellant had failed to provide a convincing explanation to exclude it. The fact of the HMRC do or do not accept the explanation is not necessarily indicative one way or another of the honesty or dishonesty of the taxpayer's behaviour.

22. On any view dishonesty was a weighty factor when judging the weight to attach to family life having regard to the provisions of section 117B of the 2002 Act. In terms of the limited rights offer the appellant's partner or wife no evidence had been produced as to this and I was invited to disregard this evidence. I was invited to allow the respondent's appeal following the review of the evidence conducted at the hearing.

Discussion

23. The requirements of paragraph 1.6 have been adequately summarised above but for convenience I repeat the definition below:

"The presence of the applicant in the United Kingdom is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs SLTR1.3-1.5) character, associations or other reasons make it undesirable to allow them to remain in the United Kingdom."

24. The summary contained in the refusal letter at page 30 -31. The guidance prepared by the respondent justified refusing the application as follows:

“(that refusal is justified under the paragraph where the applicant’s) ... presence in the UK is not conducive to the public good because as stated in your previous refusal letter it is believed you acted dishonestly in regards to your HRMC records and no plausible reason was identified to compensate for the discrepancies. You therefore fail to meet the requirements for leave to remain because paragraph S-LTR.1.6. of Appendix FM of the Immigration Rules applies

25. Slightly disconcertingly, there appeared to be some disagreement between the parties as to what the case of **Mahmood** decided. That case decided that paragraph 1.6 was not concerned with failures to disclose the truth or making false statements in support of an application for leave to remain or other immigration application. It is concerned with “undesirable conduct” or past communications with public authorities for leave to enter, leave to remain or other immigration status.

26. In support of the first application the appellant relied on documents provided to HMRC to support the claim that he was earning sufficient to discharge the eligibility criteria. This triggered a refusal on a discretionary ground (paragraph 322 (5) of the Immigration Rules). This application is entirely separate and was on the basis of this refusal on the basis of his suitability - a mandatory refusal. This refusal is not based on the manner in which he completed an application to the Home Office but on the honesty with which he dealt with another government department.

27. I find the respondent has discharged the burden of showing dishonesty to the civil standard of proof that applies to this case. I have regard to the case of **Balajigari**, which appears pertinent to the facts of this case. The respondent having raised the suspicion that information was dishonest, in that the appellant was alleged to have suppressed his true earnings in order to pay less tax, it was for the appellant to produce some information to show that the respondent’s suspicions were incorrect. Although the burden of proving dishonesty rested on the respondent to prove dishonesty, this did not alter the onus which rested on the respondent. As the Court of Appeal put it in that case:

“A discrepancy between the earnings declared to HMRC and to the Home Office might justifiably give rise to a suspicion that it was the result of dishonesty, but it did not, by itself, justify a conclusion to that effect. What it did was to call for an explanation. If an explanation once sought was not forthcoming, or was unconvincing, it might, at that point, be legitimate for the Secretary of State to infer dishonesty; but even in that case the position was not that there was a legal burden on the applicant to disprove dishonesty. The Secretary of State simply had to decide, considering the discrepancy in the light of the explanation (or lack of it), whether he was satisfied that the applicant had been dishonest (see [42] of the judgment (in the case of *R (on the application of Khan) v Secretary of State for the Home Department* ([\[2018\] UKUT 384 \(IAC\)](#))).”

28. It is difficult to ignore the fact that the accountant’s evidence was woefully inadequate . The letter dated 12 February 2018 (at 97) contains

assertions but no evidence to back them up. In particular, there was no evidence to back up the assertion that the accountants were to blame rather than the appellant. It would have been necessary to call the accountant to give oral evidence for a full explanation- yet the accountant (at page 97 of the bundle) merely states that: “Mr Pathak has provided all requested documents and information’s (*sic*) and based on that one of our junior tax consultants has prepared and submitted his tax return on 1st December 2011”. Later it is stated that it was an “error” but without providing any details other than to blame it on a member of the “junior staff” and say it was an “innocent error by HMRC”. It would have been open to the appellant to provide that explanation orally, even at the hearing before the UT, but he did not do so. Perhaps more importantly, call his accountant at the FTT to give oral evidence and be cross examined. Effectively, he invited the FTT to infer honesty but this is not a criminal case where the respondent would have to establish dishonesty to a criminal standard of proof.

29. I find that materially inaccurate information was provided to HMRC. Bearing in mind the information supplied to HMRC was designed to mislead, I find the respondent has discharged the burden which rests on her to show that the appellant qualified for refusal under the Rules.
30. Where does that leave the appellant’s article 8 claim? In this case, as in other cases under article 8, the Tribunal is required to balance the appellant’s right to enjoy his private and family life in the UK under article 8 of the ECHR against the requirement that he meet the requirements of the Rules. These include the requirements as to suitability. Section 117 B (1) of the 2002 Act provides that the maintenance of immigration controls is in the public interest. It is generally only in exceptional cases that a claimant who does not satisfy the requirements of the rules will be able to succeed under article 8 outside those rules.
31. The appellant is married to Mrs Pathak and will undoubtedly have formed a private life in the UK since coming here in 2007, where he has been working and contributing to taxes, and by virtue of his relationship with his wife, he has undoubtedly formed a substantial family life in the UK. His wife had Indian nationality which she has now relinquished to take up UK citizenship. In the circumstances, it is for the respondent to show that the interference is justified under article 8 (2) of the ECHR.
32. In circumstances in which it has been established by the respondent that she is entitled to rely on the suitability criteria not being met, due to be inaccurate information supplied to HMRC, the question then is whether the appellant is it has shown by virtue of the strength of his family life and his private life that his human rights outweigh the public interest.
33. In carrying out a proportionality assessment here I turn to consider the reasons for refusal given in this case (at page 29). The appellant and Mrs Pathak have no children and therefore it is difficult to see how the appellant’s removal from the UK would be exceptional or disproportionate. As the respondent commented in his refusal at page 32 of the electronic bundle there were no “insurmountable obstacles” to his relationship with his wife continuing in India (see also page 204). By “insurmountable obstacles” is meant “very significant difficulties” that would be faced by the appellant and his wife in continuing their

family life in India which could not be overcome or would entail very serious to the appellant or his wife.

34. The appellant and his wife are both of Indian heritage and, in the appellant's case, he had spent a significant part of his adult life in India. He would not face any obvious significant difficulties in re-integrating in India in terms of lifestyle, language and culture. These are not significant obstacles in any event, therefore.
35. No adequate evidence was placed before the FTT to demonstrate that by virtue of her change in citizenship the appellant's wife would face "insurmountable obstacles" in settling in India with her husband. Even if this were so she could continue to maintain close contact by visits and written and oral communications with her husband.
36. In a case where the rules would not be satisfied, allowing the appeal under article 8 would be unusual, given the need to maintain respect for those rules. In this appeal I have found it to be inappropriate. I find that this is not a case which ought to succeed under article 8 for the reasons given.

Conclusion

37. The appeal to the FTT was solely under article 8 rather than under the Rules. However, I am satisfied that the failure to meet the requirements of those Rules (due to his lack of suitability) was a sufficient reason for refusing leave to remain and that the respondent did not act unlawfully in the circumstances.

Notice of Decision

The respondent's appeal is allowed. The decision of the FTT having been set aside I remake the decision which is to dismiss the appeal against the refusal of the appellant's application for indefinite leave to remain.

W.E.HANBURY

Judge of the Upper Tribunal
Immigration and Asylum Chamber

25th September 2024