Upper Tribunal
(Immigration and Asylum Chamber) HU/07578/2018

THE IMMIGRATION ACTS

Heard at Glasgow
On 10 January 2019

Decision & Reasons Promulgated
On 25 January 2019

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

N K A

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr A Caskie, Advocate, instructed by Clyde, Solicitors
For the Respondent: Mr A Govan, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This determination is to be read with:

   (i) The respondent's decision dated 12 March 2018, refusing the appellant's application for leave to remain, based on 10 years residence.

   (ii) The appellant's grounds of appeal to the First-tier Tribunal.

   (iii) The decision of FtT Judge Buchanan, promulgated on 9 August 2018.

© CROWN COPYRIGHT 2019

(iv) The appellant’s grounds of appeal to the UT, stated in the application for permission to appeal filed on 22 August 2018.

(v) The grant of permission by the FtT, dated 4 September 2018.

(vi) The skeleton argument for the appellant, dated 8 January 2019.

2. The first point in the grounds (prepared by previous representatives) is that failure to declare income for tax (even deliberately) is not conduct which falls within the respondent’s policy guidance for refusal of leave. Mr Caskie supported this point, but rather faintly, acknowledging that it is not supported by the bulk of the case law, although he said it might ultimately be supported by the Supreme Court.

3. The second point in the grounds is that the judge failed properly to consider evidence from accountants [who said the incorrect declarations were due to their errors] and gave inadequate reasons for not accepting the evidence for the appellant on this issue.

4. The third point in the grounds is that the judge overlooked evidence which accounted for the appellant’s absences from the UK, and inadequately explained why those reasons were not compelling. (Mr Caskie did not support the expression in the grounds of “a disingenuous assessment”).

5. The skeleton argument appears to have been prepared by Mr Caskie’s instructing agents. Its first heading is “failure to determine whether the decision is in accordance with the law pursuant to the third limb of *Razgar*.” This is based on a misunderstanding of what that “third limb” means, and Mr Caskie did not add to this ground. The second heading, “failure to lawfully apply the burden of proof”, and the third, “failure to recognise the discretionary nature of the general ground of refusal”, lead nowhere. The fourth, “failure to consider the lack of a penalty”, is subsumed into the resolution of the submissions by Mr Caskie. The fifth heading, “perverse credibility assessment”, is only disagreement taken to an extreme.

6. Mr Caskie submitted that the decision of the FtT should be set aside, and the case should be remitted to the FtT for a fresh hearing, on two grounds, either one of which would suffice: inadequacy of reasoning on the length of residence issue, and error of approach, or the giving of “too many reasons”, on the income discrepancy issue. He said that success even on length of residence justified a remit, because that had an important impact on the final question of proportionality.

7. The argument on length of residence ran as follows. There is no discretion within the rule, which lays down a bright line, but there is discretion in the guidance, which is relevant to the proportionality assessment. The judge at 8.5 misinterpreted the guidance. The permitted period of 18 months of absences is not to allow for circumstances arising unexpectedly late in the 10-year span. Where an appellant times regular visits to his family to fit

within what is permitted, and uses up more than the average amount in one year due to a matter such as a parent's funeral, that "excess" is excusable even if it happened in an intervening year. There is no requirement to reduce future visits to adjust the period to the permitted maximum. The question is only whether there was a good reason for the "extra" time out of the UK when it occurred. Maintaining contact with children was a good reason for not shortening later visits. At 8.6, the judge failed to appreciate that the evidence about the security difficulties in the Khyber Agency (or North West Frontier), where his wife and children live, also explained why he had to stay for longer than the period in the rules.

8. On income discrepancy, the argument was on these lines. The judge had evidence from two firms of accountants that their errors were to blame. Those were statements by responsible professionals. The judge said there was no explanation of how those errors came about, but it was not for the appellant to provide that. It was sufficient to show that the error was by the accountants, not by him. The judge should not have required anything more to support those explanations. He was not the accountants' disciplinary authority. The judge thought the appellant should have seen that something was wrong, but that was with the benefit of hindsight, and it was reasonable for the appellant to trust professionals he employed to delay with such matters on his behalf. The appellant is well educated, but accountancy and tax are not his area of expertise. The judge should not have taken it that his qualifications were relevant to whether he knew there were under-declarations (5.21 – 5.25). The judge gave extensive reasons, summarised at 5.25, but effectively imposed a counsel of perfection on the appellant. He should have attached significance to the absence of a penalty from HMRC. Although not in evidence, 10% of all tax returns, some 500,00 a year, were retrospectively amended (Mr Govan did not object to this point being raised). The judge should not have found that the appellant used deceit in his tax affairs, because he "should not have gone behind the plausible explanation tendered in the accountants' letters".

9. I asked Mr Caskie if he was submitting that the judge was bound to take the accountants' letters at face value and as a complete answer on the matter. He said that he did not go that far.

10. Having considered also the submissions for the respondent, I do not find that the making of the decision of the FtT involved the making of any error on a point of law, such that it should be set aside.

11. The argument that it is irrelevant whether an "excess" is identified earlier or later in the 10-year period reads a scope into the discretionary policy which is not there. It is up to an appellant to arrange his affairs in accordance with rules from which he hopes to benefit. The judge was right at 8.5 to consider that allowance obviously went to circumstances arising unexpectedly late in the period.

12. It is conceivable that security difficulties on the North West Frontier might play a part in an extended absence, but the general existence of such difficulties, by itself, explains nothing. Mr Govan was correct in pointing out that there was no evidence on this point which accounted for any particular absence.

13. The appellant had to account for being absent from the UK not for the 540 days permitted but for 725, an excess of 185 days over the 10-year period. The judge at 8.7 was not persuaded that there were "compelling or compassionate circumstances" to justify the application of discretion. That involves the making of no error. Further, it is difficult to see that, given the long period to be excused and the weakness of the explanations offered, any judge might sensibly have found such circumstances had been shown.

14. I take it to be presently settled that someone who has deliberately made false declarations of income to HMRC or to UKVI, or to both, may fail to qualify for leave through the application of paragraph 322(5) of the immigration rules; see e.g. *Dadzie and Parker-Wilson* [2018] CSOH 128 at [15] and [16].

15. Statements by qualified professionals carry a certain status, but Mr Caskie referred to no authority which required the judge to give them any higher value than he did. Their letters were not certificates which the judge was bound to take as conclusive. He was entitled to evaluate their terms, and to place them in context of all the other evidence, including the evidence of the appellant. While he was not an accountant, his level of relevant knowledge and likely insight into what was involved in declaring income and paying tax was relevant. He was, as observed at 5.24, "a highly qualified academic". While Mr Caskie stopped short of the submission that the judge was bound to take the letters as a complete answer for the appellant on the use of deceit, that was in effect his argument.

16. It is conceivable that there might be a case where accountants explain how mistakes occurred, to such effect that a judge could only rationally find that an appellant must have been blissfully unaware of the tax advantage which came as a windfall. The present case is very different. The decision thoroughly explains why the explanations from the accountants and, more importantly, from the appellant, were not accepted.

17. The conclusion at 5.25 that the appellant "deliberately asserted one set of figures for tax purposes and … another … for immigration purposes" is not shown to have involved the making of any error.

18. The decision of the First-tier Tribunal shall stand.

19. The FtT made an anonymity direction. There does not appear to be justification for one, but as neither party addressed the matter in the UT, anonymity has been maintained herein.

14 January 2019
UT Judge Macleman