IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023 000921
First-tier Tribunal No: HU/56360/2021
IA/15163/2021

THE IMMIGRATION ACT

Decision & Reasons Issued:
On 22 November 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS ADERONKE OLUFUNMILAYO OLAYERA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr N Wain HOPO.
For the Respondent: Mr Alam,Counsel.Instructed by No 12 Chambers

Heard at Field House remotely on 25 August 2023

DECISION AND REASONS

Introduction

1. This is the Secretary of State's appeal. For convenience, I will continue to refer to the parties as they were in the First-tier Tribunal.

2. The appellant is a national of Nigeria, born on 19 September 1969.She came to the United Kingdom on 22 February 2011 with entry clearance under the Tier 1

general provisions. Leave was until 12 January 2013. On 10 December 2012 she was granted further leave until 2 February 2016. On 16 January 2016 she applied for indefinite leave to remain based on completing five years as a Tier 1 migrant.

3. This was refused on 19 May 2016 on suitability grounds. The respondent believes she had been dishonest in the claim she had made about previous earnings. The appellant said she was self-employed and ran a catering business as a sole trader. The decision was maintained following an administrative review. When a judicial review was intimated there was a reconsideration and the refusal was maintained, albeit four years later. Further representations were made by the appellant on 21 September 2020 culminating in the refusal letter of 4 October 2021 .

4. The respondent found she did not meet the requirements of paragraph 245 CD(g).This required an applicant to have 80 points. She was awarded no points in respect of previous earnings. She had claimed 40 points but these were not awarded. She also claimed 5 points for experience but no points were awarded .

5. The application had referred to web design rather than catering and there were invoices for consultancy services. The respondent took the view that this contradicted her claim. The respondent also referred to HMRC's records and amendments made three days before her application.

6. The respondent found paragraph 322 (5) of the immigration rules applied. This provided that leave should normally be refused where it would be undesirable for the person to remain given their conduct or character.

7. Her appeal was heard and allowed by First-tier Tribunal Judge Austin at Manchester on 24 January 2023. She was represented. The respondent chose not to be.

8. When the appellant's income, as declared for tax purposes, was compared with the figures used in her application there was a discrepancy: the income stated in the application was higher than that originally declared for revenue purposes. The issue was whether she had acted honestly in making her application. The appellant's explanation was that she had relied upon her accountant.

The First-tier tribunal

9. The First-tier Tribunal Judge found that the respondent had not demonstrated she had acted dishonestly.

10. The judge went on to consider article 8 and found that the refusal decision was disproportionate.

11. Permission to appeal was granted by First-tier Tribunal Judge Parkes who found that it was arguable the judge had not applied to correct test nor given adequate reasons for finding the appellant had not been dishonest. The judge's conclusions were arguably at odds with the earlier observations about her evidence.

The Upper Tribunal

12. Mr Wain confirmed that there was no rule 24 response. He continued to rely on the grounds for which permission to appeal had been granted. He submitted that the first issue the judge had to consider was the reason behind the appellant amending her tax liability. He submitted the judge had not followed Balajigari EWCA Civ 673 where it was said a tribunal would be unlikely to accept a mere assertion of a mistake.

13. The judge had referred to delay on the part of the respondent before a final decision was taken. However, this was attributable to the judicial review proceedings.

14. Mr Wain submitted there was inadequacy of reasoning in paragraph 16 of the decision. The judge said the respondent had not discharged the burden of showing the appellant acted dishonestly. The judge found the respondent had made assumptions not based on evidence.

15. In response, Mr Alam suggested the grounds were a mere disagreement with the outcome. The burden to show dishonesty lay upon the Secretary of State. To demonstrate a discrepancy in itself was not sufficient. There is a need to show a mens rea. He pointed out no presenting officer had attended at the First tier. The judge had found the appellant to be a credible witness.

16. The second ground advanced by the respondent also was a mere disagreement. I was told the accountant who had made the mistake had died. I cannot find any death certificate in the bundle. Mr Alam said she had engaged a new account who identified the error. In commenting on the delay by the respondent the judge was making an observation and this was not relevant to the outcome.

17. In reply, Mr Wain acknowledged the respondent had failed to provide a presenting officer but returned to his earlier submission that the bald assertion of a mistake was not sufficient. He also pointed out that reference to a mens rea was a notion in criminal law with a higher standard of proof.

18. In the event I found an error of law Mr Wain suggested that the appeal should be retained in the Upper Tribunal. Mr Alam submitted that the appellant's credibility was an issue and the matter could be dealt with either in the First-tier Tribunal or the Upper Tribunal. I reserved my decision .

Conclusion

19. First-tier Tribunal Judge Austin early on commented on the complexity of the decision letter and the lack of assistance by way of a presenting officer. The judge referred to the Court of Appeal decision of Balajugari and applicants falsely inflating earnings, particularly from self-employment, so as to remain. The judge referred to HMRC sharing information in relation to tax returns, revealing a pattern of tax returns showing a low or no liability. These were then subsequently amended to a higher income. This suggested the individual became aware that the previous declaration might jeopardise their pending application for leave to remain.

20. Clearly the judge had identified the central issue in the appeal and the relevant case law. The judge referred to the HMRC records held in respect of the appellant and the amendments made prior to her application for indefinite leave

to remain. The judge correctly stated the issue arising was whether the appellant had acted dishonestly.

21. The judge went on to consider the evidence. They heard directly from the appellant and noted her evidence appeared to be contradictory as to whether she had advised the respondent that the information in application was correct. The account given was that she had relied upon her accountants and had not checked the figures herself. The respondent in the refusal found this was not credible. The appellant's case was that her original account and had died and when she subsequently engaged accountants and it was they who discovered the errors which were corrected before the application was submitted.

22. It is not uncommon for witnesses to become confused in giving their evidence and this can be for a variety of legitimate reasons including nervousness in unfamiliar surroundings and in a stressful context or simply lack of understanding. The judge was the one who heard directly from the appellant and was in a position to make an assessment of her oral evidence.

23. At paragraph 13 the judge refers to the respondent needing to establish a mens rea. This was, with hindsight an unhelpful allusion first introduced in correspondence from the appellant's solicitors. It is a criminal law concept relating to the necessary constituents to establish certain crimes. However, outside of the criminal law context the notion relates to knowledge or wrongdoing which is the issue in the present appeal.

24. At paragraph 13 the judge found that by the time the appellant had made an application in 2016 the errors had been identified and the amendments made. The judge recorded that this evidence was unchallenged. At paragraph 14 the judge went on to correctly state that the central question was whether she had intentionally provided false figures in her application.

25. At paragraph 16 the judge found that the respondent had not discharged the burden of establishing that she had acted dishonestly. The judge found that the appellant had demonstrated a lack of understanding of the decision and accepted her evidence she had not acted dishonestly. These were matters for the judge hearing the appeal.

26. I find that the judge has addressed the central issue and has given adequate reasons. Paragraph 16 should not be read in isolation but should be read in the context of the matters set out before. The judge also had the bundles prepared for the appeal. The judge had the benefit of hearing directly from the appellant.

27. It is my conclusion that no material error of law has been established. In particular, I do not find it has been demonstrated that the judge could not reasonably have come to this conclusion. The issue was appreciated and it was a matter for the judge to assess the evidence. I do not see anything to suggest the conclusion was not open to them. The judge found the appellant met the immigration rules. With this finding it was not necessary to go on to consider article 8 on a freestanding basis but having done so the judge found in the appellant's favour on this point also.

Notice of Decision

No material error of law has been established in the decision of First-tier Tribunal Judge Austin. Consequently, that decision allowing the appeal shall stand.

Francis J Farrelly
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber