IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: JR/11417/2016

Field House
15-25 Breams Buildings
London
EC4A 1DZ

1 August and 31 August 2017

Before:

UPPER TRIBUNAL JUDGE GLEESON

Between:

KAMAL

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

MR MANJIT GILL QC appeared on behalf of the Applicant
MR ZANE MALIK appeared on behalf of the Respondent

JUDGMENT

UTJ GLEESON: The applicant has permission to seek judicial review of the respondent's decision on 22 June 2016 to refuse him indefinite leave to remain in the United Kingdom as a Tier 1 (General) Migrant pursuant to paragraph 245CD of the Immigration Rules HC395 (as amended), with reference to paragraphs 19(i) and 19J(iv) of Appendix A and paragraph 322(5) of the general grounds for refusal in the Rules.

Background

2. The applicant is a citizen of Pakistan born in 1984 and now 34 years old. He entered the United Kingdom on 3 September 2007 age 24, with student entry clearance valid until 31 October 2009. Subsequent applications extended his

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student leave to 30 August 2010. On 15 June 2010, the applicant applied for leave to remain as a Tier 1 (Post-Study Work) Migrant and was granted leave to remain until 6 July 2012 on that basis.

3. On 28 February 2011, the applicant made an unsuccessful application for Tier 1 (General) Migrant status. On 6 April 2011, the applicant reapplied for Tier 1 (General) Migrant status and was successful: leave to remain was granted from 3 May 2011 to 3 May 2013. On 5 April 2013, the applicant applied for further leave to remain as a Tier 1 (General) Migrant and was granted leave to remain from 21 May 2013 to 21 May 2016.

4. The applicant has made discrepant declarations of his employed and self-employed income for the tax year 2010/2011, as follows:

   (a) On 6 April 2011 in his Tier 1 application, the applicant claimed total earnings of £40,665.74, being £6070.74 from Euro Car Park and £37,850 from self-employment.

   (b) In his HMRC tax return for the same year, the applicant claimed and paid tax on total earnings of £12,330, being £9557 salary and £2773 for self-employment.

   (c) On 13 January 2014, almost 3 years after filing his incorrect tax return, the applicant notified HMRC of an under-declaration for 2010/2011. He now declared that he had earned £9557 for employment, but just £26,713 for self-employment, not £34,595 as asserted in his Tier 1 application in April 2011.

   (d) A continuing discrepancy of £7,882 between the April 2011 self-employed income and the January 2014 adjustment has not been declared or explained.

5. HMRC chose not to prosecute the applicant for the incorrect return. Instead, in a letter dated 14 March 2014, HMRC acknowledged the applicant's declaration of additional income, said to be related to incorrect deductions. The letter stated that it was too late to amend the return but HMRC served an additional assessment to collect the under-declared tax, interest and penalties. The applicant had previously been assessed to pay £555 tax. The adjusted amount was £7022.84, leaving £6467.84 still to pay. The applicant paid the adjusted amount.

6. The tax and salary details in the Tier 1 application on 17 April 2013 matched the sums declared.

7. The applicant's Tier 1 indefinite leave to remain application was made on 4 April 2016, before his existing leave expired. The respondent refused further leave due to the discrepancy between the applicants' claimed income in 2010-2011 in the Tier 1 application and the sum declared in his 2011 HMRC tax return. A higher corrective declaration made in 2014 still leaves a difference

of £7882 between the two figures.

Immigration Rules

8. So far as relevant, paragraph 245CD is as follows:

"245CD. Requirements for indefinite leave to remain

To qualify for indefinite leave to remain, a Tier 1 (General) Migrant must meet the requirements listed below. If the applicant meets these requirements, indefinite leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused.

Requirements:

(a) DELETED

(b) The applicant must not fall for refusal under the general grounds for refusal (except that paragraph 322(1C) shall not apply if the applicant meets the conditions in (f)(i)-(iii) below), and must not be an illegal entrant.

(c) The applicant must have spent a continuous period as specified in (d) lawfully in the UK, of which the most recent period must have been spent with leave as a Tier 1 (General) Migrant, in any combination of the following categories:

(i) as a Tier 1 (General) Migrant, …

(d) The continuous period in (c) is:

(i) [*does not apply to this applicant*]

(ii) 5 years, in all other cases. …

[(e) and (f) do not apply to this applicant]

(g) In all cases other than those referred to in (e) or (f) above, the applicant must have 80 points under paragraphs 7 to 34 of Appendix A …

(m) The application for indefinite leave to remain must have been made before 6 April 2018."

9. In Appendix A, the respondent relied on paragraph 19 and in particular, sub-paragraphs 19(i) and 19(j)(iv):

"19. …(i) The Secretary of State must be satisfied that the earnings are from genuine employment. If the Secretary of State is not satisfied, points for those earnings will not be awarded.

(j) In making the assessment in paragraph 19(i), the Secretary of State will assess on the balance of probabilities and may take into account the following factors: …

(iv) verification of previous earnings claims with declarations made in respect of the applicant to other Government Departments, *including declarations made in respect of earnings claimed by the applicant in previous applications*; …" [*Emphasis added*]

10. Paragraph 322(5) of the general grounds for refusal, which is one of those where leave 'should normally be refused' is as follows:

"**Refusal of leave to remain, variation of leave to enter or remain or curtailment of**

leave

322. In addition to the grounds for refusal of extension of stay set out in Parts 2-8 of these Rules, the following provisions apply in relation to the refusal of an application for leave to remain, variation of leave to enter or remain or, where appropriate, the curtailment of leave…

Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom should normally be refused

(5) the undesirability of permitting the person concerned to remain in the United Kingdom in the light of his conduct (including convictions which do not fall within paragraph 322(1C), character or associations or the fact that he represents a threat to national security; …"

Refusal letter

11. The respondent considered the evidence of the applicant's financial declarations against that structure, taking into account the late declaration on 13 January 2014 of the under-declared income for the tax year 2010/2011. The respondent was satisfied that the applicant had made that declaration in order to match and justify the higher earnings claimed in his April 2011 application. She considered that the applicant had been deceitful or dishonest in his dealings with either or both of the respondent and HMRC, either by under-declaration of genuine earnings for tax, or by falsely representing his self-employed income to earn more points and obtain leave to remain.

12. The respondent considered whether she should exercise her paragraph 322(5) discretion in the applicant's favour, but declined to do so on the basis that she was not satisfied that the error was genuine. She was not satisfied that a registered accountant would under-declare the applicant's earnings, or make an error in the applicable deductions, to the extent of almost £29,000. Further, the respondent considered that it was the applicant's responsibility to ensure that his tax return was correct and all his income was declared on time.

13. The applicant was not awarded the 80 points needed for a successful application. The respondent gave him 20 points for his age, 35 for his qualifications, but no points for earnings or United Kingdom experience (which is related). The applicant was awarded only 55 points and his application failed.

Administrative reviews

14. There were two administrative reviews of the respondent's decision, the first decided on 5 August 2016 and the second on 22 August 2016. In his application for administrative review on 9 July 2016, the applicant said that the respondent's decision was procedurally unfair and that the respondent should have disclosed the evidence relied upon underlying her conclusion that the applicant had declared higher earnings in order to reach the points level for his previous application.

15. The respondent maintained her position that it was the applicant's responsibility to ensure that his tax return was correctly filed, and that she did not believe that the applicant's accountant would have made such a huge error, or that if he had, the applicant would not have noticed and corrected it. The administrative review decision concluded:

> "Please note that discretion is not mandatory. The Home Office has reasonable cause to doubt the genuineness of your earnings claim made in your previous leave to remain application and, therefore, we are not satisfied that exercising discretion in your favour would be the appropriate course of action.
> In light of the above, the Secretary of State is not satisfied, on the balance of probabilities, that your claims have not been fabricated to allow you to achieve the required points for the income threshold. …We have therefore maintained the original decision."

16. The applicant challenged that decision and a further administrative review decision was issued, which considered a letter from the applicant's accountants saying that he was 'not culpable at all for the alleged discrepancy'. The applicant pointed out that he had declared the problem when completing a questionnaire at his appointment in Croydon, albeit with little detail. The question and answer were as follows:

> "Q: Have you ever needed to correct or resubmit your tax returns? If yes, please provide details and the reason why the return was incorrectly submitted?
> A. The profit figure was miscalculated when it was first submitted."

17. The respondent was not satisfied with that explanation. She did not consider that such a large discrepancy could be a miscalculation, or 'nothing more than an anomaly' as the applicant alleged. She said in the second administrative review letter:

> "We do not find it acceptable that you would declare earnings to UKVI to gain leave to remain and subsequently not declare your full earnings to HMRC."

18. The respondent rejected the applicant's assertion that the decision by the caseworker was not in accordance with her policy or was otherwise unfair or irrational. The refusal decision was maintained and the applicant proceeded to utilise the Pre-Action Protocol and then to issue judicial review proceedings.

Grounds for review

19. The grounds for review allege that the respondent's decision is unreasonable, irrational, and unlawful, in the context of her Modernised Guidance on the general grounds for refusal at Section 4 in version 24.0 of 4 February 2016.

20. The applicant asserted that the respondent's caseworker had failed to address or discharge the burden of proof on the respondent and that, in particular, the outcome of the first administrative review was 'the epitome of vaguity'. Many authorities on burden and standard of proof are cited. In the context of any implicit assertion that the applicant had committed deception, the applicant relied on *AA (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 773, which he argued 'confirms that falsity may be equiparated [compared] with an intention to lie or deceive'. I do not understand this submission to be to the applicant's advantage.

21. The thrust of the lengthy grounds for review is that the respondent has not discharged the evidential burden upon her and the decision is unlawful. There is, he says, no evidence that he deceived a government department. Clear evidence of deceit or dishonesty is required, he contends. He relied on the rebuttal evidence from his accountants that the under-declaration was entirely their fault and he was not culpable in respect of it. The respondent's conclusion that he had used deception was 'mere conjecture and speculation'. The applicant relied on his voluntary correction of his tax return in January 2014. It had not been open to the respondent to conclude, as she had, that his previous earnings were not genuine.

22. The applicant made submissions about his Article 8 ECHR rights at [57]-[58] in the grounds for review, which were repeated and expanded in Mr Gill's skeleton argument and his oral submissions. I have had regard to those submissions.

Grant of permission

23. Permission for judicial review was granted by Upper Tribunal Judge Grubb, who considered it arguable that the respondent had wrongly and irrationally applied paragraph 322(5) in the light of her own guidance, the applicant's explanation, and his subsequent conduct in submitting revised tax returns which were accepted by HMRC.

24. Upper Tribunal Judge Grubb considered that it was an arguable public law error for the respondent to look behind the HMRC's acceptance of the evidence of income retrospectively declared in January 2014, when applying paragraph 19(i) and 19(j)(iv).

Application to file detailed grounds of defence out of time

25. The Tribunal gave case management directions which required the respondent, if he wished to contest the application, to lodge and provide to the applicant and any other parties detailed grounds, or additional grounds, not later than 35 days from the sending out of the decision on 5 January 2017. A detailed timetable for the applicant's Reply, if any, and for skeleton arguments and bundles, completed the directions.

26. The applicant's application was struck out automatically for failure to pay the

continuation fee, but reinstated on 6 April 2017, with the 35-day time limit varied to run from the date of the reinstatement order, expiring on 11 May 2017. The respondent took no steps to file her detailed grounds until 28 July 2017, just over 11 weeks outside the extended time limit.

27. By an application notice dated 28 July 2017, the respondent sought permission to file a combined 'skeleton argument and detailed grounds of defence'. This is a practice which the respondent seems to have adopted recently. It is not a good one. The purpose of detailed grounds of defence is to give the applicant an opportunity to refine his pleaded case in the light of what the respondent says. A skeleton argument is a later document, to be filed when all the evidence and pleadings have been received: its purpose is to assist the Judge and the other party by focusing the arguments to be considered during the hearing. It is not appropriate to conflate the two documents, particularly without permission. Nor was it appropriate to file the key document (the detailed grounds) on 28 July, just 1 clear working day before the substantive hearing.

28. I heard evidence from the respondent's caseworker, Mr Williams, who adopted the contents of the application for extension of time, supported by a statement of truth, as his evidence in chief. Mr Williams confirmed that the respondent had been aware of the reinstatement of the application in April 2017. He said that he was not the original caseworker but had been given the file in early May 2017 to pick up: by that time, the respondent was up against the 11 May deadline. He noticed then that the detailed grounds had not been prepared.

29. Mr Williams accepted that he had not made an application for an in-time extension of time. He accepted that there had been a discussion in early July between himself and the applicant's solicitors, although he had kept no note of it. There were some solicitor-client discussions on the respondent's side as to whether the application should be settled. By early July 2017, it was clear that the respondent would defend the application, but Mr Williams accepted that he did not engage promptly with the judicial review proceedings then.

30. There was no cross-examination.

31. I considered the Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) at rules 7(2) and 2. Rule 7 permits the Upper Tribunal to take such action as it considers just where a party has failed to comply with a direction, including (save where the case is an asylum case or an immigration case) restricting a party's participation in the proceedings. The present application is neither an asylum case nor an immigration case as defined in rule 1. Rule 2 contains the overriding objective.

32. I am not satisfied by the respondent's explanation for the delay. It is not a potentially valid explanation (see *JA (Ghana) v The Secretary of State for the Home Department* [2015] EWCA Civ 1031 and *The Secretary of State for the Home*

Department v SS (Congo) & Ors [2015] EWCA Civ 387). I am not satisfied that it is in the interests of justice or of the overriding objective to allow the respondent to disregard the Upper Tribunal's directions in this manner.

33. I refused to admit the detailed grounds/skeleton argument or to allow Mr Malik to participate in the proceedings. I have, however, had regard to the summary grounds which accompanied the acknowledgment of service.

Submissions

34. Mr Gill relied on his skeleton argument, which incorporated by reference the judicial review grounds. He contended that the respondent had alleged criminal conduct by the applicant, a deliberate and dishonest fraud on the respondent and/or HMRC. A full investigation should have been conducted before reaching the conclusion that such criminal conduct had been established. The respondent's reasons were no more than a bare inference from the disparity.

35. The applicant had not been interviewed by the respondent, and no reason had been given for her decision not to do so. Many other applicants in his circumstances were interviewed. The result was that the applicant had not been fairly treated nor had the procedural protections which ought to have applied been available to him.

36. The respondent had given no weight to the applicant's actions in January 2014 in correcting his under-declaration, over 2 years before the indefinite leave to remain application was made, which he contended pointed strongly away from dishonesty. It was unclear what, if any, benefit he would have accrued in the long run by under-declaring his income to HMRC. The Upper Tribunal should not speculate as to what the applicant's reasons were, or his intention to achieve any benefit by his conduct.

37. The applicant had disclosed the error and its resolution, in his response to the questionnaire concerning his previous returns and HMRC had accepted his amendment. It was speculative to assert that the much lower tax he was asked to pay should have triggered a concern that his income had been under-declared. Mistakes occurred and it was not open to the respondent to assume that this error was intentionally or recklessly made. No such inference could lawfully be drawn on the material before the respondent. The primary burden of proof was on the respondent, and had not been discharged to the requisite high standard of proof.

38. The Secretary of State had not demonstrated that it was more likely than not that the applicant had been dishonest in his 2010/2011 HMRC tax return. The respondent could have asked HMRC for its opinion thereon: there had been the opportunity to do so. The respondent should not be allowed to rely on the discrepancy alone, otherwise no claim of this type could ever succeed and the underlying factual matrix for paragraph 322(5) would always be

established by the fact of such a discrepancy. The burden was upon the respondent to establish dishonesty and it had never been discharged. The applicant relied on *AA (Nigeria)* and argued that it was unreasonable to deny the applicant, who had corrected the error over 2 years before the present application, the further leave to remain he sought. Mr Gill contended that the respondent's exercise of her discretion or failure to do so was unlawful and the decision should be quashed.

Respondent's summary grounds

39. Mr Malik asked me to look at the acknowledgment of service, which was in the papers before me. I have done so. The respondent noted the explanation for the discrepant declarations, which was that the profit figure had been miscalculated by his previous accountant. The respondent argued that this was no explanation at all as to why two entirely different figures were submitted, for the same year, to UKVI and HMRC. That was not indicative of a genuine calculation error. I note that, although the respondent did not rely on it in the refusal letter, it appears that the applicant still has not declared to HMRC the full amount of the self-employed earnings relied upon in his UKVI applications. Even having regard to the higher sum declared in 2014, there remains a difference of £7882 between the total income relied upon in the UKVI application, and the 2014 HMRC declaration.

40. The respondent had identified a clear discrepancy between information on his income provided with the April 2011 Tier 1 (General) Migrant application and to HMRC's records of the income declared for that year. The vast majority of the self-employed earnings had not been declared, and the respondent was entitled to give weight to that. The respondent was further entitled to consider that the 2014 partial declaration of the missing amounts did not relieve her concerns about the applicant's character or conduct.

41. As regards the general grounds, *AA (Nigeria)* was a case on the application of sub-paragraphs 322(1A), 322(2) or 322(2A). The respondent had not refused under any of those sub-paragraphs: the provision in question here was sub-paragraph 322(5). There was no need thereunder to evidence deception or dishonesty, nor was there any requirement for a person to have been convicted of a criminal offence for paragraph 322(5) to apply.

42. As regards the failure to allow the applicant to explain, the applicant had been given that opportunity in the questionnaire and his response had been taken into account. Paragraph 245AA (the evidential flexibility policy) was not applicable here because there was no missing document; rather, the applicant had provided incorrect information to either or both of UKVI and HMRC. The applicant had a duty to provide all relevant information and documents with his application. The decision the respondent made on the basis of the information provided was correct and lawful.

43. The respondent observed that this was not an Article 8 ECHR application but

a points-based system application for Tier 1 (General) Migrant status. The applicant could make an Article 8 claim if he chose to do so. There was very little Article 8 evidence here, nowhere near the standard required to substantiate a private and family life claim.

44. I reserved my decision.

Discussion

45. I begin by considering the human rights element of the grounds for review. It is right to say that permission was neither expressly granted, nor excluded, on this element of the grounds, and that therefore, Mr Gill was entitled to argue all the grounds.

46. However, the decision under challenge arises from a points-based system application. There is presently no human rights application before the respondent and it is not the function of the Upper Tribunal on judicial review to act as primary decision maker in those circumstances. There is very little to support a human rights claim in the grounds or the evidence before the respondent in this claim, but if the applicant does have a valid human rights claim, it remains open to him to make it to the respondent, if so advised.

47. Since the applicant has an alternative remedy on Article 8, judicial review is not appropriate and I do not need to consider the human rights claims in detail.

48. I turn next to the substance of this claim, that the respondent erred in the refusal decision and both administrative reviews by concluding, without interviewing the applicant or contacting HMRC for further comment, that sub-paragraph 322(5) of the general grounds for refusal applied to this claim, and by refusing to exercise discretion in favour of the applicant regarding the discrepancies in his UKVI and HMRC submissions.

49. The applicant asserts that he inadvertently under-declared his self-employed income for 2010-2011 and that he (at least partially, it seems) corrected that under-declaration in January 2014. It appears that he also overdeclared his earned income (£6070.74 in the UKVI application and £9557 in the HMRC application). The difference of £3486.36 over-declared to HMRC for his earned income on that return is not sufficient to account for the under-declaration of £35,077 self-employed income.

50. It is right that the applicant made some acknowledgment of the under-declaration to HMRC on 4 April 2016 in his response to the questionnaire he completed when attending the respondent's Croydon office to submit his Tier 1 (General) Migrant indefinite leave application. The explanation given in his response to the questionnaire, that 'the profit figure was miscalculated when it was first submitted' does not really explain why the applicant did not consider that a tax liability for his self-employment of £555 accurately reflected earnings of about £38,000.

51. The letter from the accountants accepting responsibility takes matters no further: the responsibility for accounting properly for income is always that of the taxpayer and the difference here is so huge that the respondent was unarguably entitled to consider that the applicant could not have overlooked it innocently. Nor is it the case that the applicant derived no advantage from the errors: there is an advantage in giving a high figure for the self-employed income to UKVI, since it makes a substantial difference to the points awarded and thus to the success of the applicant's 2011 application, on which, in part, his 5-year qualification period for the Tier 1 indefinite leave to remain application was based. Conversely, the under-declaration to HMRC significantly reduced the amount the applicant was liable to pay in tax in 2011: even if the full amount of tax due was later paid (and on these figures, that is not certain), the ability to pay tax from 2010 in 2014 is an obvious benefit to the applicant.

52. HMRC has a discretion to decide how to proceed in cases of underpayment of tax, and in particular, whether to prosecute the offender or to recover the underpaid tax and penalties without commencing proceedings, pursuant to the provisions of the Taxes Management Act 1970. HMRC exercised its discretion in the applicant's favour.

53. The respondent has a separate discretion under sub-paragraph 322(5). The exercise by HMRC of its discretion is not related to the exercise of the respondent's sub-paragraph 322(5) discretion, nor is it probative of the matters which the respondent must decide thereunder. The respondent must make her own decision as to the applicant's conduct and character, and whether to exercise discretion in his favour.

54. The respondent's reasons for not exercising her discretion in his favour are proper and lawful. There is no public law error in the conclusions she drew from the evidence before her and she was unarguably entitled to conclude that sub-paragraph 322(5) was relevant and that she 'should normally', and in this case should, refuse leave to remain thereunder, pursuant to rule 245CD(b) of the Rules.

55. I refuse judicial review of the respondent's decision, which will stand.

Costs

56. For the respondent, Mr Malik argues that as the successful party she is entitled to her costs of these proceedings, up to but not including the detailed grounds of defence and attendance at the Upper Tribunal hearing. He contends that the respondent's non-compliance began on 11 May 2017, and that she is entitled to her costs up to and including that date, to be assessed if not agreed, or at least, to her costs of the acknowledgment of service.

57. For the applicant, Mr Gill argues that the respondent should pay the

applicant's costs, or at least a high percentage thereof, because the respondent's conduct has been unreasonable, for the reasons set out at [25]-[33] above. Absent any response from the respondent, the applicant was not able properly to prepare her case for the hearing, and until the respondent filed and served a request for extension of time on 28 July 2017, it was not clear that the respondent did intend to participate in the proceedings.

58. Alternatively, the applicant contends that there should be no order for costs.

59. I remind myself of the principle set out in *Mount Cook Land Ltd & Anor v Westminster City Council* [2003] EWCA Civ 1346 as to the approach to costs in judicial review proceedings. The respondent is certainly entitled to her costs of the acknowledgment of service. In addition, I am satisfied that it is right to award her the costs to which she is entitled as the successful party, but only up to and including 11 May 2017. Thereafter, by reason of the respondent's breach of directions, I make no order for *inter partes* costs.

Application for permission to appeal

60. Mr Gill in an email received on Friday 25 August 2017 stated that his instructing solicitors were taking instructions on whether to seek permission to appeal to the Court of Appeal. He was instructed that any such application would be made by noon of the day preceding the hearing. No such application has been received.

61. I have considered for myself whether I should grant permission to appeal, pursuant to paragraph 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended). I refuse permission, because I am not satisfied that there is any arguable error of law in the judgment I have given in this application.