IAC-FH-LW-V1

IN THE UPPER TRIBUNAL

EXTEMPORE JUDGMENT GIVEN FOLLOWING HEARING

JR/6546/2016

Field House,
Breams Buildings
London
EC4A 1WR

26 April 2017

THE QUEEN
(ON THE APPLICATION OF)
SAGAR ARUN SAMANT

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

BEFORE

THE HON. MR JUSTICE COLLINS

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Mr R Sharma, instructed by ML Solicitors appeared on behalf of the Applicant.

Mr Z Malik, instructed by the Government Legal Department appeared on behalf of the Respondent.

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ON AN APPLICATION FOR JUDICIAL REVIEW

APPROVED JUDGMENT

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MR JUSTICE COLLINS:

1. This is an application for judicial review of the decision of the Secretary of State originally made on 18 March 2016 whereby she refused the application made by the applicant for indefinite leave to remain in this country on the basis of him meeting the requirements of Tier 1.

2. The basis of the refusal was that it transpired that he had made tax returns, in particular for the year ending April 2013, which did not coincide with the figures put to the Secretary of State in relation to his earnings.

3. It is important to note that it was, on the face of things, in his interests to reduce the amount on which he had to pay tax when making his returns to Her Majesty's Revenue and Customs, but it assisted his application for leave to remain the higher the income he could establish because more points were awarded for higher levels of earnings.

4. The discrepancy was relied on by the respondent and the decision was that there had been a deliberate failure to provide correct figures and that meant that the applicant fell foul, and they put it that way, of the requirements of paragraph 322(5) of the Immigration Rules. Paragraph 322 is a provision which justifies the refusal of leave to remain on a number of specific grounds even if, on the face of it, an individual might qualify in relation to the grounds he relies on. 322 provides and I quote:-

> "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 are to 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 ...".

5. There is no doubt, and the applicant accepted that the figures that he put to HMRC were not correct. He had employed a firm of accountants in order to produce the relevant figures and there is in the bundle information from the accountants, a firm called Oasis Accountants Limited, dated 12 February 2013, and what the accountant said, so far as material, was that in accordance with the applicant's instructions and to assist him to fulfil his funding for the requirement in relation to extension of leave to remain in the United Kingdom, they were pleased to put together the financial statements for the relevant period, which was a period ending 1 January 2013.

6. The then application that was being referred to was, it would seem, an application which was approved in March 2013 when he was granted further leave to remain as a Tier 1 (General) Migrant until 3 March 2016. So it seems that, on the face of it, the information obtained from the accountants was for that purpose, and what the figures given by the accountants were that, in a detailed trading and profit and loss account for the relevant period, the operating profit was £29,972. When it came to submitting the relevant tax return, the information

submitted was not at all the same. What was then stated was that the turnover amounted to £29,555 and then there were deducted what were described as allowable business expenses which included costs of goods bought, car, van and travel expenses, a significant sum of £8,500 for wages, salaries and other staff costs, and £1,100 odd for rent and rates, and the total of such expenses was said to amount to £17,700 odd, so that the net profit was £11,818, and there was a further deduction in relation to investment allowance of £400, so that the taxable sum, or rather the sum upon which tax was due to be paid, was £11,418.

7. What the applicant now says in relation to that is in a statement that he made long after the decision with which we are concerned as follows. He says that he had already submitted copies of the amended tax returns, as indeed he had, and he was not properly advised by his then accountants. What he says in the statement in that regard at paragraphs 9 to 13 is as follows:-

> "9. At the time of my applications to the Secretary of State I did genuinely believe that my income was accurately stated in my management accounts.
>
> 10. At the time of my official tax returns I had sought assistance from an accountant and he advised me additional heads of expenses that can be charged from my income.
>
> 11. It was only once I had seen (he names the firm), accountants who filed my 2010-2011 and 2012-2013 amendments, I realised that I was ill-advised previously.
>
> 12. I could not charge certain items as business expenses therefore I had to submit amends to the tax returns.

13. I submit that at no stage did I deliberately try to deceive the Secretary of State or HMRC."

8. What he said when he was asked about this in relation to the application that he made for the permanent leave to remain is set out in the refusal letter. He was asked:-

"Q - Are you satisfied that the self-assessment tax return submitted to HMRC accurately reflect your self-employed income?

A - You ticked 'No' to indicate you are not satisfied that the self-assessment tax return submitted accurately reflect your income and added a note that states: 'for the years 2010-11 & 2012-13 I have already sent the revised version last year to HMRC after consulting new accountant. Letter of acknowledgement attached.'

At your appointment on 08 February 2016 ... you were interviewed about your earnings. Question 6 of the interview asked:

Q - You have identified that there have been errors in your tax return for the years 2010-11 and 2012-13. How did you come to realise these errors?

A - Immigration Solicitor noticed when preparing applications."

and the decision maker went on to say this:-

"Were it accepted that the figure declared to the Home Office was an accurate representation of your earnings between February 2012 to January 2013, your actions in failing to declare your earnings in full to HM Revenue & Customs would lead your application to be refused under

paragraph 322(5) of the Immigration Rules based on your character and conduct, as it would be considered that you have been deceitful or dishonest in your dealings with HM Revenue & Customs."

9. The decision maker went on to accept that it would not necessarily follow that if the figure declared to the Home Office was accurate and the failure to notify customs appropriately would not inevitably be culpable, but the point was made that there would have been a benefit to him in the low figure to the Revenue and the higher figure to the Secretary of State and the decision was that in the circumstances it was believed that dishonesty had been established and accordingly his presence in the United Kingdom was not conducive to the public good.

10. There is no question but that the test to be applied in establishing dishonesty is on the balance of probabilities, but it has often been said that the more serious an allegation the greater the level of probability, if that is the right way of putting it, that has to be established, and there is no question that in order to establish dishonesty the higher level of the balance has to be applied, albeit it is still the balance of probability. Mr Sharma submits too that when one looks at the terms of 322(5) and the guidance that is applied, the conduct relied on must be at a high level in order to justify a finding that it was non-conducive to an individual to remain. The references are to character or associations and convictions, but it is made clear that the existence of a conviction is not necessary, and a threat to national security, and there was no question of that arising in this case. But if a false tax return, or indeed any false information has been given knowingly to the Secretary of State or to another Government body for any purpose, that would suffice, but it is necessary to establish that it was done

deliberately and was not simply a mistake or a result of poor advice.

11. The difficulty, as I see it in the case put by the applicant, is that he has asserted that he was given particular advice which would enable him to put in the expenses that he relied on to reduce his tax liabilities, but there is no evidence produced from either the original accountants, Oasis, who made the report, or any subsequent accountant who may have spotted the error and dealt with it. If it were accepted by a representative of the accountants that he was so advised, that would be an exceedingly powerful point in his favour. Equally, of course, it would be damaging to him if it was not accepted that any such advice had been given. The difficulty as I see it that he faces is that the report from Oasis could not be clearer. It refers to profit and the profit will be what is earned over and above expenses that have been properly incurred. That is the only sensible meaning to be attached to profit, and so it is to say the least strange that he felt able to include the expenses against that figure. Furthermore, it is perhaps, as I have said, surprising that we have had no supporting evidence at all to deal with the error that he says was a genuine error and it, of course, is a fact that the Oasis report was obtained with a view to the making of the application, and that was the figure that was put in the application.

12. Mr Sharma submits that there has been no clear indication as to which of the amounts the respondent alleges to have been dishonest, but it seems to me that if one looks at this sensibly, it is the HMRC submission that was the wrong one, and indeed that is the effective approach of the Secretary of State if one looks at the decision letter as a whole.

13. There was an administrative review sought and obtained. The applicant in his submissions in effect indicated that it was a mistake, that he was someone who would not have put anything dishonest and he had worked hard in order to establish his right to remain in this country and it would hardly have been either in his interests or likely that he would have thrown that away by making any false representation, either to the Home Office or to the Customs. The review upheld the decision that had been made.

14. There was a further point that in the decision letter there was a refusal to accept the figure of £26,716 which was said to amount to the profit for the year ending 31 January 2016 and the Secretary of State did not accept those earnings were from genuine employment.

15. In the review application it was said that evidence could be produced to establish that, but that was said not to be material which a review would accept and essentially that if there was to be any such extra evidence it would need to be made with a fresh application.

16. That point, that is to say reliance in any event on the failure to accept the £26,000 odd figure, only arises if I am with the applicant on what I will call "the dishonesty point". I must say that since, as it seems to me, the only real basis for relying on dishonesty is in what was submitted to the Revenue & Customs and since the £26,676 figure is in conformity with the £29,000 figure put forward by Oasis, it does not seem to me that if that had stood on its own it would have been a proper basis for refusal.

17. I put it that way because it is and has to be accepted that as a result of a decision of the Court of Appeal in **The Queen (Giri) v The Secretary of State [2015] EWCA Civ 784** the approach that I have to adopt is to consider whether the

decision of the Secretary of State was a rational decision. It is not for me to remake the decision because there is no right of appeal and thus the right is limited to judicial review. Mr Sharma submits that there should be a greater flexibility, particularly where deception is involved and there is no right of appeal which should enable the court in a proper case to consider facts. Indeed, in a subsequent case called McVey it was indicated by Mr Justice Silber that there should be an application to cross-examine. That is something that is open, yet in fact, in the context of this case relates to the second ground, which I will come to, but as a matter of principle, if there is a factual issue it is possible in certain circumstances, if it considers it is essential in the interests of justice to do so for the court to allow that there can be cross-examination, even if it is not a case which falls within the precedent fact exemplified by the age assessment decision in the Supreme Court, **M v Croydon**, or which itself stem from **Khawaja v The Secretary of State** in relation to deception used to obtain leave to enter.

18. Since the only remedy is judicial review, as I say, it must be that unless prevented by some matter which it cannot overcome, the court will try to do justice if it can. But the general rule for judicial review is that one looks at the material that was before the Secretary of State when the decision was made, and of course it would have been open to the applicant to have produced evidence to support his contention in relation to the wrong information given to HMRC which went beyond merely his assertions; that he did not do. Furthermore, it is interesting to note that in the tax return the box which is there to indicate whether he has had any advice was left blank, and accordingly there is no indication that he did receive advice.

19. I do understand the concerns of the applicant, but I am afraid that it is impossible in my judgement to say that the Secretary of State acted irrationally in concluding as she did. Even now, the supportive information has not been provided and it was clearly open to the Secretary of State to rely on the advantage to the applicant in understating for tax purposes his income and giving the true figure in relation to his application, because unless one disregards the Oasis report, and there is no good reason to do so, it is difficult to believe that that was not a true figure which was produced.

20. There is a further point raised by the applicant and that is that there has been a failure to comply with the guidance that a decision to refuse on 322(5) has to be approved by a senior caseworker. The Secretary of State has produced a statement from Hilary Grace who was the senior caseworker for the Sheffield Service Centre which was the relevant centre which dealt with the application in question. There is produced what are described as the GCID records which are filled out in order to indicate the progress of an application. There is no specific indication that the decision maker referred the matter to a senior caseworker. However, what is said in relation to 18 March, which is the date of the decision, is that the relevant documents were sent to the Admin Review Team, although as I say, it is not said in terms that it was submitted to a senior caseworker and that is something that the guidance requires. In the statement this is said and I quote:-

> "7. ... It is standard procedure in Premium Services that a case must be referred to a Senior Caseworker if a caseworker is proposing to refuse an application. Once the decision to refuse is approved by the Senior Caseworker, the refusal letter must also be approved by the Senior Caseworker before the decision can be

finalised and notice of decision served on the applicant.

8. I can confirm that I was in the office on 18 March 2016, and that the caseworker who made the decision is aware of the process for referring cases to a Senior Caseworker when an application falls for refusal.

9. I can therefore state with a high degree of certainty that the case was referred to me for approval of the refusal, and for checking the refusal letter on 18 March 2016, before it was finalised ..."

That statement was made on 15 February 2017, so some eleven months after the events in question. It is perhaps not entirely surprising that she does not recall in terms, particularly as there is nothing in the GCID notes which indicate that it was referred to her. Mr Sharma submits, and one can understand why, that that is not sufficient to indicate that there was indeed the referral that was necessary. It is known that the Administrative Review Team does involve consideration by a senior caseworker, but furthermore, as it seems to me, I have no good reason to doubt that the necessary procedure was gone through.

21. There is one further matter I should deal with before leaving this case. Going back to the first ground, Mr Sharma relies upon the fact that HMRC has not taken any steps to impose a penalty. There is, as a report which has been presented indicates, a power to impose a penalty in relation to any late return or amendment of a return and it is, under the relevant legislation incumbent upon HMRC to consider in any given case whether it is appropriate to impose a penalty. Of course, it may be in a given case appropriate to go further and institute criminal proceedings. One can well understand that HMRC would not institute criminal proceedings unless there was a very

good reason to do so and the fact that that has not occurred it does not help one way or the other, but there is some force in the submission that the fact that no penalty has been imposed, which would be the case if HMRC did not take the view that there was any carelessness, let alone dishonesty, then why should the Home Office, or UKBA as it then was, take a different view which was a view that indeed there had been deliberate failure to put forward the appropriate correct sums, and it was not merely carelessness. It seems to me that I do not think Mr Malik in the end really felt able to contradict this, but that it is only if there was a deliberate failure to produce proper figures that 322(5) should probably be applied. If he was indeed badly advised or if it was mere carelessness, that would not on its own suffice to justify 322(5).

22. The difficulty again here is that we have no evidence from the Revenue as to whether they did consider the question of penalty or what steps, if any, they decided to take and the reasons why they decided as they did. It, in my judgement, cannot be assumed that in every case, having regard to what one knows to be the pressures on HMRC, that they would have gone through the exercise that maybe they should have gone through, and decided that they were satisfied that there was not even carelessness. It seems to me that in any given case, depending on amounts, depending on the circumstances, HMRC may well decide that the effort in reaching particular conclusions frankly is not justified in all the circumstances. I am afraid I do not think that the fact that HMRC has decided not to take further action can indicate that the decision of the Secretary of State is one which was irrational.

23. It follows that in all the circumstances, I am bound to say with a degree of regret, I cannot find that this application is made out. Accordingly it must be dismissed.

Order and Costs

(1) The application is dismissed.

(2) Leave to appeal refused.

(3) The applicant pay the respondent's costs, to be the subject of a detailed assessment if not agreed.

(4) The reasons judgment given in presence of parties which will be approved in due course.

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