Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05772/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 February 2018	**On 7 March 2018**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

MUHAMMAD SIDDIQUE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr Z. Nasim, Counsel
For the respondent: Ms A. Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The appellant relied on claimed earnings of £42,718.22 in support of Tier 1 application in 2010. He relied on claimed earnings of £46,226.54 in support of Tier 1 application in 2013. It is reasonable to infer that the respondent was satisfied with the evidence at the time because both applications were granted.

2. The appellant applied for Indefinite Leave to Remain (ILR) on 16 December 2015. On receipt of the application for ILR the respondent made further enquiries with HMRC. The outcome of the enquiries showed that the appellant had not declared "any self employed or employed earnings with them." On 16 December 2015 the respondent requested further evidence from the appellant, including an SA302 tax calculation issued by HMRC. His legal representative requested more time to respond. It is said that further time was granted, but no further evidence was produced in response to the respondent's request

3. The appellant appealed the respondent's decision dated 12 February 2016 to refuse ILR with reference to the general grounds of refusal under paragraphs 322(2), 322(5) and 322(9) of the immigration rules.

4. First-tier Tribunal Judge Herlihy ("the judge") dismissed the appeal in a decision promulgated on 20 March 2017. The judge took into account the oral and documentary evidence and outlined the terms of the relevant immigration rules [8-9]. The judge outlined the allegation made by the respondent that the earnings he claimed in the applications for leave to remain made in 2010 and 2013 were not reflected in the HMRC records. The judge summarised: "In a nutshell the claim is that the Appellant was claiming a higher level of income in order to satisfy the Immigration Rules when he made his application for a Tier 1 General Migrant in 2010 and 2013 but when submitting tax returns for the same period he had claimed that he was earning less." [20].

5. The judge went on to outline the correct legal test relating to the burden and standard of proof. She confirmed that the burden of proof was on the respondent to show that paragraph 322(2) applied on the balance of probabilities. She also had regard to the Court of Appeal decision in *AA (Nigeria)* [2010] EWCA Civ 773 [21].

6. The judge considered the explanation put forward by the appellant in response to the allegation. She heard evidence from the appellant, but did not find him a reliable witness. The appellant's explanation was that his accountant made an error in submitting the tax returns and had confused his details with another person. The judge did not find it plausible that the appellant did not check the tax returns before they were submitted [22]. There was no evidence to show exactly how or why the error occurred [23].

7. The judge went on to give reasons to explain why she did not find the appellant's explanation as to how he discovered the error credible. There was no evidence to support his claim that he applied for a mortgage in September 2015. The judge noted a discrepancy, which undermined the appellant's account. The appellant said that he discovered the error when he obtained an SA302 tax calculation from HMRC during the mortgage application, yet was unable to produce an SA302 when requested by the respondent only a couple of months later [24]. The judge did not find it plausible that the errors were only said to have occurred in the two years

when he made an application for leave to remain and noted the lack of evidence to support the appellant's claims [25].

8. The judge observed that the evidence relied upon by the respondent from HMRC to support the allegation was missing. However, she noted that the appellant did not dispute this aspect of the allegation. He accepted that his income was under reported. It was his evidence that mistakes were made by his accountant and that he had now taken steps to rectify the errors [26]. The judge considered the most recent tax calculation for the year 2009/2010 issued on 20 May 2016, which indicated that the appellant declared income from employment and self-employment of £19,542. This was significantly lower than the amount he subsequently claimed when amending his tax liability, which was £37,219 [27].

9. The judge noted a similar pattern of large discrepancies in the figures for the tax years 2010/2011 and 2012/2013 [28-29]. The judge concluded that it was not credible that the appellant was unaware of such large discrepancies and noted that the pattern of under reported income was repeated for several tax years. The judge was satisfied that the appellant used deception in his previous applications for leave to remain as a Tier 1 Migrant by falsely claiming that his income was higher than it was [30]. For the same reasons she also concluded that paragraph 322(5) applied because the appellant's character and conducted in using deception in previous applications was such that it was undesirable to allow him to remain in the UK [31].

10. The appellant appeals the First-tier Tribunal decision on the following grounds:

    (i) The judge erred in failing to consider the fact that the respondent had failed to produce evidence to support the allegation that he provided false information about his income in previous applications. The appellant provided the relevant documents to support the applications at the time and was awarded points for previous earnings.

    (ii) The judge erred in failing to give due weight to the letter from the appellant's accountant who accepted that they made errors in the tax returns.

    (iii) The judge took issue with the fact that the appellant failed to provide evidence to corroborate his earnings for the relevant tax years. The appellant had now obtained copies of the documents submitted in support of the applications for leave to remain following a Subject Access Request. It was asserted that the judge erred in law in determining the appeal without these documents.

    (iv) The judge erred in finding that the high threshold required for refusal under paragraph 322(5) was met because her findings relating to paragraph 322(2) were flawed.

    (v) The judge erred in failing to consider whether the respondent exercised discretion properly in the circumstances of this case.

Legal framework

11. Paragraph 322(2), (5) and (9) of the immigration rules set out grounds on which leave to remain should normally be refused.

> (2) the making of false representations or the failure to disclose any material fact for the purpose of obtaining leave to enter or a previous variation of leave, or in order to obtain documents from the Secretary of State or a third party required in support of the application for leave to enter or a previous variation of leave.
>
> …
>
> (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;
>
> …
>
> (9) failure by an applicant to produce within a reasonable time information, documents or other evidence required by the Secretary of State to establish his claim to remain under these Rules;

12. In *AA v SSHD* [2010] EWCA Civ 773 the Court of Appeal found that an element of dishonesty was required to show that a "false representation" had been made for the purposes of mandatory refusal under paragraphs 320(7A) or 322(1A) of the immigration rules though the dishonesty need not have been carried out by the applicant. The Secretary of State had given assurances that the rules were not intended to catch those who had made innocent mistakes but to apply to those who had told lies in an application.

Decision and reasons

13. The first ground has no merit. The judge referred to the correct legal test and noted the fact that the respondent had failed to produce the evidence relating to her enquiries with HMRC. However, the judge was unarguably entitled to take into account the fact that the appellant did not dispute that there had been significant under reporting of his income.

14. The appellant accepted that the figures were wrong, produced a letter from an accountant who claimed it was as a result of his error, and produced other evidence to show that he took steps to revise the figures and was making additional payments to HMRC. In such circumstances, it was not necessary for the respondent to produce the underlying evidence from HMRC. The fact that there were significant discrepancies in the income declared to HMRC and the claimed income relied upon to support the previous applications for leave to remain gave rise to a strong inference that the appellant may have deceived the respondent by inflating his claimed income in previous applications for the purpose of gaining points under the immigration rules. The initial evidential burden of proof was discharged

and the evidential burden then swung to the appellant to provide an innocent explanation in response.

15. The judge rejected the appellant's explanation with full and cogent reasons, which were open to her to make on the evidence. The judge clearly had regard to the letter from the accountants when she made her decision because it was referred to at [25]. The evidence that purported to come from the accountant repeated the appellant's explanation that he had confused the appellant's details with another client. The judge considered this explanation at [22] but rejected it with sustainable reasons. Not only was it implausible that the appellant would not check the tax returns before they were filed, but it is equally implausible that the accountant would make the same unlikely error on several occasions.

16. I note that the appellant's explanation that the accountants confused his details with another client is also belied on the face of the evidence. The appellant produced the amended tax calculation for the year 2009/2010 as evidence to show that he had rectified the error made by his accountant (pg.22 AB). The original figure for the appellant's employed income remained exactly the same (£18,172) in the revised figures, but the figure for the appellant's claimed income from self-employment increased from £1,370 to a revised figure of £19,047. If the original figures were mixed up with those of another client as the appellant and the letter purporting to be from his accountant claim, it seems highly unlikely that the figure for employed income would remain the same. The very low figure given for self-employed income in the original tax return supports the judge's conclusion that the appellant sought to deceive the respondent by inflating the amount he claimed to earn from self-employed income for the purpose of the application for leave to remain in 2010.

17. Although the judge did not make specific findings to outline what weight she gave to the letter purporting to be from an accountant, it is quite clear from her findings that she rejected the credibility of the explanation given by the appellant, which was the same as the explanation given in the accountant's letter. Any error is immaterial because the letter would not have made any difference to the outcome of the appeal given the judge's findings.

18. In so far as semantic submissions were made about whether the judge considered the type of income relied upon by the appellant properly it is not material to the core issue raised in the appeal. The appellant accepted that the tax returns involved significant under reporting of his claimed income. It hardly mattered whether it was employed, self-employed or involved dividend income. The significant discrepancies were sufficient to discharge the respondent's evidential burden of proof. The judge turned to consider whether the appellant provided an innocent explanation in response and gave sustainable reasons for rejecting the credibility of his account. It is understandable that the appellant disagrees with the decision, but it is not arguable that the judge's findings were outside a range of reasonable responses to the evidence.

19. It is difficult to see how the judge could have erred in failing to take into account evidence that was not before her and has only been produced after the hearing. It was not disputed that the appellant produced evidence of his claimed income with the applications for leave to remain in 2010 and 2013. The respondent was satisfied with the evidence at the time and granted leave to remain. It was only after enquiries were made with the HMRC following the application for ILR that the respondent casts doubt on the reliability of that evidence and asserted that the significant discrepancies in the appellant's claimed levels of income led to the conclusion that he used deception in those previous applications. The clear inference is that the evidence produced in support of those applications was likely to be unreliable. The respondent did not have to prove this with any certainty, only to the balance of probabilities.

20. In any event, the documents attached to the application for permission to appeal do not take the issue any further. The only documents relating to the application made in 2010 are a partial copy of the application form and the decision letter granting leave to remain. No copies of the documents relied upon to support the 2010 application are provided. The judge's findings in relation to the 2010 application are unaffected.

21. The rest of the documents relate to the application for leave to remain made in 2013, which include copies of supporting documents such as employed and dividend income from his directorship of AB Management IT Services Ltd. Unaudited financial statements were prepared by the same accountant, whose credibility must be in doubt given the implausible explanation provided about the claimed errors. A number of credits from AB Management IT Services Ltd are recorded in a bank statement in the appellant's name, but even if the appellant now seeks to rely on this evidence, no schedule of the income has been prepared.

22. The amount of previous gross earnings claimed by the appellant in the application made in 2013 was £46,226.54 with a combination of salary and dividend payments from the company. His updated evidence showing the adjustments he made with HMRC was before the First-tier Tribunal (pg.30 AB). The HMRC calculation printed on 09 June 2016 showed that the appellant previously did not declare any income for the tax year 2012/2013. The revised figures declared £10,104 from all employments and dividend income of £30,121, giving a total declared income of £40,225. The fact that HMRC had no record of income tax that was purportedly paid as part of the appellant's employed income undermines the reliability of the payslips produced in support of the original application for leave to remain, which purported to deduct income tax.

23. The Tribunal will normally not consider new evidence which was not before the First-tier Tribunal in deciding whether the First-tier Tribunal decision involved the making of an error of law. Although there was evidence before the respondent at the date of the application in 2013 to indicate that the appellant might have received some income from AB Management IT Services Ltd, the fact that no tax was

declared in relation to that income does cast doubt on the reliability of the evidence that was submitted in support of the application. Even if the source of the income relied upon in the 2013 were to be verified, it would not undermine the judge's overall finding that paragraph 322(2) applied in relation to the 2010 application. It was still open to the judge to find that paragraph 322(5) applied if the appellant failed to declare any income for the tax year 2012/2013. Nothing in the further evidence produced after the First-tier Tribunal hearing shows that the First-tier Tribunal's findings were, as a matter of fact, wrong to the extent that the decision should be set aside.

24. For the reasons given above I find that the judge did not err in her consideration of the issues relevant to paragraph 322(2) of the immigration rules. She considered the relevant legal framework and gave detailed and sustainable reasons to explain her findings. Having concluded that the appellant used deception in previous applications for leave to remain in 2010 and 2013 it was unarguably open to her to find that the appellant's conduct was sufficiently serious to also justify refusal under paragraph 322(5) of the immigration rules.

25. In relation to the last ground of appeal, an application for leave to remain will "normally be refused" if the conditions outlined in paragraphs 322(2) or 322(5) apply. The paragraphs do not provide for mandatory refusal, but will normally apply if there is evidence that an applicant made false representations in a previous application. It is not clear whether this issue was argued before the judge, and if so, what grounds were put forward to say that discretion should have been exercised. Apart from the general assertion that the appellant is likely to be disadvantaged by the refusal because he will be denied the opportunity for settlement, and can no longer apply for further leave to remain in the same category, no good reasons have been given as to why discretion should have been exercised to depart from the normal course of action, which was to refuse the application. In the circumstances it is difficult to see how the judge could have erred if there was no basis upon which the respondent should have exercise discretion.

26. For completeness, I note that the application for ILR was also refused under paragraph 322(9). No evidence appeared to be produced to undermine this reason for refusal and no ground of appeal has been raised in relation to the issue. The appeal would have been dismissed on this ground alone.

DECISION

The First-tier Tribunal decision did not involve the making of an error of law

The First-tier Tribunal decision shall stand

Signed  Date 06 March 2018
Upper Tribunal Judge Canavan